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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING THE

DECEMBER TERM, 1891.

—

BY

JOHN W. SHEPHERD,

STATE REPORTER.

—

VOL. XCV.

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THOS. W. COLEMAN, ASSOCIATE JUSTICE, Eutaw.

RICHARD W. WALKER, ASSOCIATE JUSTICE, Huntsville.

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* Judge Clopton died February 5th, 1892, and Judge Thorington was appointed to fill the vacancy created by his death.

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RULE OF CHANCERY PRACTICE.

It is ordered by the Court that Rule 4 of Chancery Practice be amended so as to read as follows:

4. *When register grants orders.*—Decrees and orders may be applied for before the register every Monday. This rule shall not apply to orders for the issuing of writs of *ne exeat* and equitable attachments, and for the sale of personal property levied on, in granting which, registers shall not be restricted to Mondays. If the register should not get through with the business before him on any rule day, he may continue his sittings from day to day until such business is disposed of.

This rule, as thus amended and adopted on December the 9th, 1890, shall go into effect on January 1st, 1891.

ERRATA.

In *Webb v. Demopolis*, p. 124, 17th line from bottom, for *if* read *it*; p. 127, 2d line from bottom, for *grade* read *grant*; and p. 137, 19th line from top, for *direction* read *duration*.

In *McDonald v. Walker*, p. 174, 6th line from bottom, for *frtal* read *fatal*.

In *G. A. Ins. Co. v. Com. Fire Ins. Co.*, p. 475, 2d line from bottom, for *objection* read *exception*.

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CASES
IN THE
SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1891.

Maul v. The State.

Indictment for Murder.

1. *Admissibility of confessions.*—On a prosecution for murder, confessions voluntarily made by the defendant, a negro boy about sixteen or seventeen years old, to the sheriff who had him in custody, and who had told him, in response to an inquiry, “if it would be best for him to tell the truth about it,” that “it was always best for him or any one else to tell the truth about anything,” are admissible as evidence against him.

FROM the Circuit Court of Lowndes.

Tried before the Hon. JOHN MOORE

The defendant in this case, a negro boy about sixteen or seventeen years old, was indicted for the murder of Mr. Ed. Maul, by shooting him with a gun; was convicted of murder in the first degree, and sentenced to be hanged. The opinion states the facts bearing on the only point here presented for revision.

WM. L. MARTIN, Attorney-General, for the State, cited *Aaron v. State*, 37 Ala. 106; *King v. State*, 40 Ala. 314; *Dodson v. State*, 86 Ala. 60; *Dotson v. State*, 88 Ala. 208.

COLEMAN, J.—The only exception reserved, as shown by the record, is as to whether the declarations made by the defendant, and which were admitted against his objection, were made voluntarily. The testimony of the witness by whom the declarations were proven is as follows: “I am sheriff of Lowndes county. A few days after defendant was put in jail, I received a message from him to come to the jail, he wanted to see me. Soon afterwards I went to the

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jail, saw defendant. and asked him what he wanted with me. He replied he wanted to tell me about the killing of Mr. Maul. I asked him if he knew about the killing of Mr. Maul. He replied, 'yes, sir, I do;' and added, 'I have sent for you to talk with you about my case.' I then told him to go ahead, and tell me all about his case. He asked me if it would be the best for him to tell the truth about it. I replied, that it was always best for him, or any one else, to tell the truth about anything. He then said, 'Me and this man,' referring to another person in jail, 'have been talking about our cases, and I have sent for you to tell you about it.' I then said, "If you are going to tell the straight truth, I will listen to it, and want to hear it; and if you are not going to tell the truth, I don't want to hear it." He hesitated two or three seconds, and I said to him, 'Go ahead and tell me all you know about the case.'" The declarations of defendant testified to by the witness were then made.

The principle upon which these declarations were admitted, can not be distinguished from that applied to the facts in the case of *Dotson v. State*, 88 Ala. 210; *Dodson v. State*, 86 Ala. 60; *Aaron v. State*, 37 Ala. 106; *Hornsby v. State*, 94 Ala. 58. In these cases, the confessions of the defendant were held to be voluntary and admissible.

This being the only exception reserved for review by this court, and under our view of the law being free from error, the case must be affirmed. The day appointed by the trial court for the execution of the sentence of the law pronounced by the court upon the verdict of the jury having passed, it becomes the duty of this court to appoint another day. It is therefore considered by this court, that Friday, the 8th day of July next, 1892, be appointed as the day for the execution of the sentence, and on that day it is ordered and adjudged that Sam Maul, the defendant, in a place and in the manner required by law, be hanged by the neck until he is dead; and the sheriff of Lowndes county is charged with the duty to execute the judgment of the court.

Affirmed.

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[Croft v. The State.]

Croft v. The State.

Indictment for Crime against Nature.

1. *Charge as to reasonable doubt and probability of innocence.*—A charge asked in a criminal case, instructing the jury that “a reasonable doubt of the defendant’s guilt is not the same as a probability of his innocence, but may exist when the evidence fails to convince the jury that there is a probability of defendant’s innocence,” asserts a correct legal proposition, is not ambiguous, argumentative or misleading, and its refusal is reversible error.

FROM the Circuit Court of Etowah.

Tried before the HON. JOHN B. TALLY.

WM. L. MARTIN, Attorney-General, for the State.

MCCLELLAN, J.—The only exception reserved on the trial below goes to the refusal of the court to give the following charge requested by defendant: “A reasonable doubt of defendant’s guilt is not the same as a probability of his innocence. A reasonable doubt of defendant’s guilt may exist when the evidence fails to convince the jury that there is a probability of defendant’s innocence.” There can be no doubt that the abstract proposition involved in this request is a sound one. Under the ruling in the case of *Williams v. State*, 52 Ala. 411, however, this charge would be condemned as being confusing, in that it fails to enlighten the jury as to the meaning of the expression “probability of innocence.” In that case, the trial court refused to instruct the jury that, “if from all the evidence there is a probability of the innocence of the defendants, the jury must find them not guilty;” and this court, holding that the refusal was proper, said: “It [the charge] would have involved the jury in doubt and uncertainty, unless it had been carefully explained to them what was intended by a *probability of innocence*.” But, in the subsequent case of *Bain v. State*, 74 Ala. 38, *Williams’ case* was overruled as to the point under consideration, and it was held that a charge requested by the defendant, to the effect that “a *probability of defendant’s innocence* is a just foundation for a reasonable doubt of his guilt, and therefore for his acquittal,” should have been given. Reaffirming *Bain’s case*, our conclusion must be that

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there is nothing in the phrase, "probability of innocence," as employed in the present case, which involves a tendency to confuse the jury, and that the request is not objectionable on that ground. Nor can it be contended that any other term or phrase of the proposed instruction was of a character to require explanation to avoid confusing the jury. So that, when taken as a whole, we are unable to perceive that the request belonged to that class of charges which is condemned in *L. & N. R. R. Co. v. Hall*, 87 Ala. 723, as being ambiguous, involved and metaphysical. The only other possible objection to it is that it is argumentative; and this we think is untenable. It is, of course, the right of a defendant to have the jury instructed as to the measure of proof necessary to his conviction, and the character of the doubt of his guilt which will justify,—even require his acquittal. This, it would seem, can not be better or more intelligibly accomplished than by differentiating the reasonable doubt which demands a verdict of not guilty from other possible mental conditions which, though they too require acquittal, are not essential to that result, since, though they may not exist at all, yet there may be such a doubt reasonably arising from a fair consideration of all the evidence as would entitle the defendant to a favorable verdict. And there would appear, indeed, to be a sort of necessity for this differentiation between a reasonable doubt and a probability of innocence, in view of our decisions which, to the mind of a layman, might admit of being contorted into a requirement that the jury should believe that the defendant is probably innocent before they would be justified in finding him not guilty. The charge, in our opinion, ought to have been given.

The judgment is reversed, and the cause remanded.

Young v. The State.

Indictment for Murder.

1. *Dying declarations*.—Statements made by the deceased after he received the fatal shot are not admissible evidence as dying declarations, unless it is shown that he was at the time "impressed with the belief that death was impending and would certainly ensue;" and this does not appear when the evidence only shows, as in this case, (1) that the physician who was summoned immediately told him he could not recover, (2) that he lived two days, and (3) that he declared

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to another witness he "would get even with defendant when he got up."

2. *Charge ignoring fault in bringing on difficulty.*—A charge requested on a trial for murder, which claims an acquittal on certain facts hypothetically stated, but ignores other evidence tending to show that the defendant was not without fault in bringing on the difficulty, is properly refused.

3. *Reasonable doubt*, to justify an acquittal in a criminal case, implies more than "if it is possible, or it may be, or perhaps the defendant is not guilty;" and a charge asked, which uses those terms as the equivalent of reasonable doubt, is properly refused.

FROM the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

The defendant in this case, Robert Young, was indicted for the murder of Jesse White, by shooting him with a pistol; was convicted of murder in the second degree, and sentenced to the penitentiary for the term of ten years. The difficulty between the parties occurred on the evening of May 7th, 1891, in the city of Mobile, at or near the defendant's shop, whither the deceased had gone to do some writing for him; but the attendant circumstances, if fully developed on the trial, are not clearly stated in the bill of exceptions. The statement of the deceased to the physician who was at once summoned and attended him, which was admitted in evidence as a dying declaration, against the objection and exception of the defendant, was, "that they got into a quarrel, he got scared and ran, and Bob Young shot him;" and the physician testified, from his examination of the wound, that the deceased, when he was shot, "was running and in a stooping position." The defendant, testifying in his own behalf, stated that the deceased "came running into his shop with a knife in his hand, struck at him, and cut his clothes; and that he seized his pistol, and shot in self-defense, but did not know whether he hit the deceased." The opinion states all the facts in connection with the declarations which were admitted.

The court charged the jury as follows: "In a case of homicide, the law presumes malice from the use of a deadly weapon, and casts on the defendant the *onus* of repelling the presumption, unless the evidence which proves the killing shows also that it was perpetrated without malice; and whenever malice is shown, and is un rebutted by the circumstances of the killing, or by other facts in evidence, there can be no conviction for any less degree of homicide than murder." The defendant excepted to this charge, and also to the refusal of each of the following charges, which were asked by him in writing: (1.) "The jury must not convict the defendant, unless they are convinced from the evidence,

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beyond all reasonable doubt, that the defendant took the life of the deceased without any apparent necessity to do so for the protection of his own life." (2.) "Unless the evidence excludes to a moral certainty the hypothesis that the defendant might have fired on the deceased under the reasonable apprehension that it was necessary to do so in order to protect himself against great bodily harm at the hands of the deceased, they must find him not guilty." (3.) "If it may be true, so far as the jury can tell, to a moral certainty from the evidence, that the defendant fired on the deceased under the reasonable apprehension and appearance that it was necessary to do so in order to protect himself from great bodily harm at the hands of the deceased, they must acquit the defendant." (4.) "In this case, the defendant was under no obligation to retreat from the deceased; and if the reasonable appearances were, that the defendant was in danger of great bodily harm at the hands of the deceased, then he had the right to take the life of the deceased in order to protect himself, and he would not be guilty of any crime for doing so." (5.) "No man is obliged to retreat from an attack made on him in his own place of business, but has the right to stand and repel the assault by all means reasonably necessary to protect himself; and if the jury believe from the evidence that the reasonable appearances were that the defendant was in danger of great bodily harm at the hands of the deceased at the time he fired, and that he fired on the deceased believing that it was necessary to do so for his own protection, then they ought to acquit the defendant." (6.) "There is no evidence in the case tending to show that the defendant provoked the difficulty in which the deceased was killed, and therefore the jury must acquit him, if they believe from the evidence that, at the time he fired on the deceased, he did so under the reasonable apprehension that the deceased was about to do him serious bodily harm." (7.) "If from all the evidence the jury believe it is possible, or it may be, or perhaps the defendant is not guilty, and if they are [not?] morally certain that he is guilty; this amounts to a reasonable doubt, and entitles the defendant to an acquittal." (8.) "If there is a bare probability that, when the defendant fired on the deceased, the deceased was making an assault on him with a knife, in such a manner that the defendant was apparently in danger of great bodily harm at his hands, then they must acquit the defendant."

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WM. L. MARTIN, Attorney-General, for the State, cited *Faire v. State*, 58 Ala. 74; *Mills v. State*, 74 Ala. 21; *Pulliam v. State*, 88 Ala. 1; *Hammil v. State*, 90 Ala. 577.

COLEMAN, J.—The first exception relates to the admission of statements by the deceased as dying declarations. The testimony tends to show that the attending physician was called professionally to see deceased on the 7th day of May, 1891, immediately after the fatal shot was fired. The physician testifies that deceased “was suffering very much, and was then in a dying condition;” “that he died at 6 o’clock A. M. on May 9th, 1891; that it was hardly two days from the time he was first called; that he told deceased that he was going to die.” With the exception of a description of the wound, and that it caused the death of White, the deceased, the foregoing statement contains the entire predicate upon which the declarations were admitted. Before declarations of deceased are entitled to be received in evidence as dying declarations, it must appear that declarant, at the time they were made, was impressed with the belief that death was impending and would certainly ensue. It is not necessary to their admissibility, in point of fact, that they be made in *articulo mortis*, and that dissolution resulted immediately afterwards, but declarant must be impressed with the conviction that he can not possibly recover. *Hammil v. The State*, 90 Ala. 580; *Pulliam v. State*, 88 Ala. 3; *Reynolds v. State*, 68 Ala. 506; Wharton on Ev., §§ 282, 286; 1 Greenl., § 158. The facts and circumstances testified to by the physician, and the statement made by the physician to deceased, were all legitimate for the consideration of the court, which must determine the admissibility of the evidence.—*Faire v. State*, 58 Ala. 80. We fail to discover anything in his testimony, or elsewhere in the record, which indicates directly the state of mind of the deceased, at the time the declarations were made. After laying the predicate as we have stated it, the witness says: “I asked deceased who shot him, and deceased replied that Bob Young shot him; that he got into a quarrel, and got scared and ran; that he did not have a knife.” We can not say from the statement of the physician here detailed, that at the time deceased made the statements testified to he had given up all hope of recovery. It nowhere appears that deceased expressed the belief that he was mortally wounded, and there is nothing to show that his confidence in the opinion of his physician was of that degree that an expression of opinion by him to the deceased, that he “was going to die,”

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was of itself sufficient to convince the deceased of its truth. It was not necessary to render them admissible that deceased should have expressed the conviction that he would not recover; and an expression to this effect would not necessarily make them competent. The court must consider all the circumstances attending the declarations, and if from them all the fair and reasonable inference arises that declarant was convinced in his own mind that his wound was mortal, that death was impending, his declarations are entitled to be considered in evidence.—*Willis v. State*, 74 Ala. 24; 58 Ala. 80, *supra*. We think a just and salutary administration of the law requires that courts should have due regard to the rules and limitations placed upon declarations made by a person in the absence of the defendant against whom they are offered in evidence, and in regard to which he has had no opportunity to cross-examine declarant, before they can be regarded as dying declarations, and thus become admissible against him. We find in the record another statement by the deceased, to-wit: "that he would get even with him [referring to the defendant] when he got up." No question is raised on this latter statement, and it is not shown at what period of his illness the declaration was made; and we refer to it simply to show that, notwithstanding the wound and the suffering of deceased, he expected to "get up." We do not think the predicate in this case was sufficient to authorize the introduction of the statements of deceased as dying declarations.

We find no error in the first charge given by the court defining murder. It is unnecessary to consider the other charges given, which undertake to define murder in the first degree. The defendant was convicted of murder in the second degree, and can not be re-tried for a higher offense than that for which he was convicted. There was no error in refusing the charges asked by the defendant. All of them are objectionable, and, with the exception of the one numbered 7, ignore certain facts testified to by witnesses examined on the part of the State, from which, if believed, the jury might infer that the defendant was not free from fault in bringing on the difficulty. The definition given to a reasonable doubt, in charge number 7, finds no warrant in any decision of this court.

For the error in admitting the dying declarations, the case must be reversed and remanded.

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*Ex parte Davis.**Application for Discharge on Habeas Corpus.*

1. *Jurisdiction of justice outside of precinct, or beat.*—Except when sitting as a committing magistrate on a preliminary investigation of a criminal charge, and other cases specially authorized by statute, a justice of the peace has no jurisdiction to hear and determine a criminal case outside of his own beat or precinct (Code, §§ 4233, 4274, 4279-82), though he may "issue process to any precinct in his county, returnable to his own court in his own precinct, and may, perhaps, while outside of his precinct, issue process anywhere within the county, returnable to his own court in his own precinct." (Limiting *Boynton v. State*, 77 Ala. 29.)

2. *Name; conclusiveness of judgment: defects available on habeas corpus.*—When a judgment rendered by a justice of the peace, in a criminal case, is regular on its face, and he had jurisdiction both of the offense and of the defendant's person, its validity can not be assailed on application for a discharge under *habeas corpus*, by parol evidence of the fact that it was rendered by the justice outside of his own precinct, and entered on his docket on his subsequent return home.

3. *Confession of judgment for fine and costs.*—On a confession of judgment by a surety for the defendant in a criminal case (Code, § 3832), he is bound only for the fine and costs; and if it shows on its face that the defendant's contract also binds him to perform service for advances made to him during the term, it is void entirely.

APPEAL from a judgment rendered by Hon. W. J. HILLIARD, judge of probate of Pike county, refusing to discharge the appellant, Jack Davis, from the custody of the sheriff of said county, who held him under a *mittimus* issued by a justice of the peace, "on a charge of violating a criminal contract," as the offense was described in the *mittimus*.

D. A. BAKER, and THOS. H. WATTS, for appellant.

WM. L. MARTIN, Attorney-General, for the State, cited *Boynton v. State*, 77 Ala. 29; *Taylor v. Woods*, 52 Ala. 474; *Horton v. Elliott*, 90 Ala. 480; *Smith v. State*, 81 Ala. 74; *Smith v. State*, 82 Ala. 40; *Wynn v. State*, 82 Ala. 55; 51 Ala. 34; Code, §§ 4233, 3832, 4255, 4289.

THORINGTON, J.—The petitioner was tried before a justice of the peace in Pike county, on a charge of violating a written contract alleged to have been entered into by him pursuant to the provisions of section 3832 of the Criminal Code, and on preliminary investigation before a justice of the peace was committed to jail to answer the charge in the Circuit Court of said county.

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An application for a writ of *habeas corpus* was made by the petitioner to the judge of probate of said county, based on the ground that the contract which the petitioner was charged with having violated was not made and entered into in open court, on a confession of judgment by petitioner and his surety; this contention being predicated on the following facts: A warrant was duly issued, on affidavit, against petitioner on a charge of obtaining money on false pretenses, said warrant being so issued by a justice residing in Beat (or Precinct) 14 of said county. Afterwards, on December 28th, 1891, the justice who issued the warrant being on his way to Troy, which is in Beat 1 in said county, met an officer with petitioner, whom he had arrested under the warrant, and was carrying to the office of the justice in Beat 14 for trial. Petitioner thereupon informed the justice that he desired to plead guilty to the charge in the warrant; whereupon all the parties repaired to the sheriff's office in the court-house at Troy, where the petitioner put in a plea of guilty to the charge, of which plea and his judgment thereon the justice made a memorandum, and transferred the same to his docket on his return to his office in Beat 14.

The bill of exceptions states that, at the time of receiving the plea and noting the judgment, the justice did not open his court, nor did he have his docket with him, nor did he come to Troy on that day for the purpose of holding court; and that at the time of pleading guilty as aforesaid, petitioner signed a contract with one Bush to work for him as set forth in the bill of exceptions, which contract was approved by the justice, and purports to have been recorded in the office of the judge of probate. A copy of the judgment entered on petitioner's plea of guilty is shown by the bill of exceptions as it appears on the docket of the justice, and which recites that "the defendant appeared in open court, and pleaded guilty to the charge," &c.; and also recites that the fine and costs were settled in full by said Bush.

There is nothing on the face of the judgment indicating that the proceedings were had, or the judgment rendered, elsewhere than at the office of the justice, or that the fine and costs were paid before the contract was entered into. The contract entered into by petitioner with said Bush is also set out in the bill of exceptions, and recites on its face that petitioner was, on the day of its date, convicted of a misdemeanor "in the justice court of Pike county, Ala.," and that said Bush had become the surety of petitioner for the fine and costs in the case. The contract binds petitioner

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to work for said Bush a sufficient length of time to pay the fine and costs, and also any advances Bush should make to petitioner during the term of service, at the rate petitioner was allowed to pay the fine and costs; and the contract also includes ten dollars over and above the fine and costs, which was paid by Bush to one Rhodes, at petitioner's request, on a debt the latter owed Rhodes. The contract is signed by petitioner and said Bush, and recites that it was signed in open court. It is approved in writing by the justice, and was recorded in the office of the probate judge.

In order to entitle the petitioner to a discharge on the application for a writ of *habeas corpus*, something more than mere irregularity and error in the proceedings or process by which he is detained in custody must be shown. If there is jurisdiction in the court to try the offense imputed to the prisoner, no error or irregularity which may have occurred or been committed in exercising such jurisdiction can be inquired into on *habeas corpus*. An appeal is the appropriate remedy for the correction of such errors and irregularities.—*Ex parte McKivett*, 55 Ala. 236; *Ex parte State, in re Long*, 87 Ala. 46. "Illegality, not irregularity, must infect the proceeding, to authorize a discharge on *habeas corpus*." *Ex parte Brown*, 63 Ala. 187.

The Constitution of this State requires the election of two justices of the peace in each precinct of the counties, by the qualified electors thereof, and defines their jurisdiction in civil cases, but not in criminal cases.—Art. VI, § 26. And the statute, Code, § 341, following the Constitution, requires the election of two justices of the peace "for each election precinct." Section 4233 of the Criminal Code declares that justices of the peace have, in their respective counties, jurisdiction of the offenses named in said section; and chapter three of said Code provides the jurisdiction and proceedings before justices, and other officers, on preliminary investigations of public offenses.

In *Horton v. Elliott*, 90 Ala. 480, it was decided by this court, that a justice of the peace, elected in one precinct, has no jurisdiction to hear and determine a civil case in an adjoining precinct, except in cases of emergency as provided in the statutes. But it was said in that case, "In what we have said no reference is had to the jurisdiction of a justice when sitting as an examining court, on the preliminary investigation of a criminal charge."

In *Boynton v. The State*, 77 Ala. 29, in a case growing out of a preliminary investigation of a public offense, in which one justice of the peace had associated two others with him on

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the hearing, it is said, "Two of these officers . . . were unquestionably competent to sit in the cause, either one of them alone constituting a legal examining tribunal for the purpose of such a trial. It was no objection to them that they were holding their court out of their beats, or precincts, because justices of the peace in this State have a criminal jurisdiction in such matters co-extensive with their counties;" and sections 4628, 4632 and 4663 of the Code of 1876 are cited to support the proposition. These sections are identical with sections 4223, 3716 and 4274 of the present Code, in so far as they affect the territorial jurisdiction of a justice of the peace, and sustain the proposition announced in the above cited case only in a limited sense.

There are several sections of the Code which prescribe specific cases in which justices of the peace may hear and determine preliminary investigations of crime, within their counties outside of their own precincts; such, for example, as sections 4274, 4279, 4280 and 4282; but the very fact that these statutes permit it in the cases therein designated, is sufficient to show that such authority would not exist but for such statutes, and excludes the idea that the jurisdiction exists in other cases not provided for by the statutes.

The principle, as announced in the words above quoted from *Boynton v. The State*, is stated too broadly, and should be confined in its application to cases of like character. The two justices who sat in that case, on the preliminary examination outside of their own precincts, were associated by another justice of the county with himself on such hearing; and it was therefore a case clearly provided for by the statute, and a case in which said justices could have exercised jurisdiction in any precinct in the county under like circumstances—that is, on being associated with himself by a justice, of equal grade, in such other precinct.—Crim. Code, § 4279. And as a proposition applicable, generally, to criminal cases triable before a justice of the peace, it could not be sustained.

The words in section 4233 of the Criminal Code, "in their respective counties" (which section specifies the criminal cases of which justices of the peace have jurisdiction), must be considered in the light of the constitutional and statutory provisions requiring the election of justices of the peace for each precinct in the counties, and with the body of laws in the Code relating to the jurisdiction of such officers, and also with reference to the laws protecting freeholders from suits before justices of the peace in other precincts than that in which they reside, except in the cases otherwise ex-

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pressly provided for by statute. So looking at the matter, we think a justice of the peace has jurisdiction in criminal cases mentioned in section 4233, "in their respective counties," in the sense that process may go out from his court to any precinct in the county, returnable to his court in his own precinct, and, perhaps, he may, while out of his own precinct, issue process anywhere within the county, returnable to his own court in his own precinct; and also, in the sense that he may sit outside of his own precinct, and anywhere within the county, in the special instances expressly prescribed by the statutes; but there is no general statute or authority for his hearing and determining cases, triable before him, outside of his own precinct.

Under the constitutional provision and the statute relating to his election, the court of a justice of the peace is a court for the precinct in which he is elected, and for him to hold such court in other precincts for the trial of cases within his jurisdiction, except when the statutes expressly permit it, would violate the intent and policy of the law, which intent and policy is the more apparent from the fact that a County Court is provided by law for each county, with monthly terms, for the trial of all misdemeanors committed anywhere within the county, including those of which justices of the peace are given jurisdiction.

In the case of *Phillips v. Thralls*, 26 Kansas Rep. 780, it is said: "In the absence of express statutory authority, a justice of the peace can not hold his court outside the locality which elects him, and of which he is an officer. Whatever the limits to which process may go out from his court, or whatever the territorial jurisdiction conferred upon him, he is an officer of the township; his court is a court of the township, and his court, as a court, has no valid existence outside the limits of that township." And in the same case it is further said: "One purpose contemplated in the organization of these courts was to have neighborhood courts.

. . . . If one justice may move his court out of his township, to any other place in the county, all may; and we may have the spectacle of all the justices of all the townships in a county, congregating in the county-seat, and holding office there. Thus would one of the beneficent purposes of these inferior courts be defeated."

In the case of *Durfee v. Grinnell*, 69 Ill. Rep. 371, it is said: "It is a familiar rule of the law, that, in our State, a justice of the peace has jurisdiction throughout the county in which he resides. We know of no reason, nor has any been suggested, why a justice of the peace may not issue

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any writ when he has jurisdiction, wherever he may be in the county, so he make it returnable to his office, which must be in his township. No law requires him to be in his township, or in his office, when he issues his writs; but he must be in his county, which is the limit of his jurisdiction.

. In all cases where there is a contest, or where he has to hear and adjudicate on any question, that must be done in his township, and at his office, which must be a known place, and which may be found by those required to appear before him." To the same effect is the case of *Foster v. McAdams*, 9 Tex. Rep. 542.

The general principle declared in these decisions is sound, and entirely consistent with the letter and policy of the statutes of this State relating to the jurisdiction of justices of the peace in criminal cases which they are authorized to hear and determine.

What has been said has no application to justices of the peace, if any, whose jurisdiction to try criminal cases is extended by special statute beyond the limits of their precinct; nor to justices of the peace while sitting in the preliminary investigation of public offenses, who sit on such investigation outside of their own precincts, in cases in which the statutes authorize them to sit in other precincts than their own; nor to cases in which a justice acts anywhere within his county as a conservator of the peace, pursuant to section 4680 of the Code.

If this were the only question in the case under consideration, it would be disposed of by what has been said; but there are other questions which must determine its disposition. Here, the jurisdiction of the justice, in the case in which petitioner pleaded guilty, and in which the contract for service was executed, and by virtue of which contract petitioner obtained his liberty, was regularly and properly acquired by affidavit and warrant duly made and issued in a case coming within the category of cases of which justices of the peace are given jurisdiction by section 4233 of the Criminal Code; and, furthermore, the judgment entered by the justice in the case appears on its face to be regular, there being nothing whatever to indicate that the plea of guilty was received, or the judgment taken or entered, or the trial had, outside of the precinct for which said justice was elected. If the objections raised by petitioner to these proceedings had come up on a direct attack, or on appeal, we would have felt bound to sustain them; but such is not the aspect of the case, as it comes before us; on the contrary, it is an attempt in a collateral proceeding to contradict

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the record of the justice's court by parol testimony. This, it is not competent for the petitioner to do.

In the case of *Smith, Stebbins & Co. v. Engle*, 44 Iowa, 265, it is held that the jurisdiction of a court of limited jurisdiction having once attached, its subsequent proceedings are presumed to be as regular as those of a court of general jurisdiction, and they can not be collaterally impeached or attached. And in the case of *In re Watson*, 30 Kansas Rep. 753, in a *habeas corpus* case, it was held that the petitioner could not be heard to show by parol that a judgment which had been rendered against him in a criminal case, was rendered in a case heard and decided by his consent outside of the county in which the court had jurisdiction, and entered on the records of the court in regular form as though rendered in the course of proceedings in said court. In *Hazelett v. Ford*, 10 Watts, Penn. 101, it is said: "The justice is a judge of a court which, deriving its jurisdiction from statutory grants, proceeds in most things according to the substance contained in the forms of the common law, and his docket, as to things adjudicated by him, has the conclusiveness of a record." In *Coffman v. Hampton*, 2 Watts & Serg. 377, it is said: "The docket of a justice of the peace is the best evidence to show the cause of action before him, and parol evidence is inadmissible to contradict or vary it." In *Clark v. McCombs*, 7 Watts & Serg. 469, the above cases are approved, and it is held that the proceedings before a justice of the peace, "as to their conclusiveness, are placed on the same platform as the adjudication of a common-law court."

There may be, and are, many cases where, on account of the informal and careless manner in which proceedings are conducted before a justice of the peace and entered on his record, it becomes indispensable that parol testimony should be resorted to in aid of the record, and in order to make it intelligible; but, without going to the full length of some of the foregoing authorities, the proposition may be deduced from them, and from general principles of law, that where it is apparent that the justice had jurisdiction both of the subject-matter and of the person, and the record appears on its face to be regular and complete in itself, such record can not be impeached on a collateral attack by parol testimony, but must be taken as conclusive. The contract into which petitioner entered, therefore, is to be treated as though it had been taken in a case regularly and properly tried before the justice, as shown by the records of his court.

But, giving to it this effect, it still can not be held to be such a contract as is contemplated by section 3832 of the

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Code. In view of the penal character of that section, inasmuch as it provides for the punishment of those who enter into contracts under its terms and afterwards violate them, its operation must be confined to such contracts as come clearly within the terms of the statute. Such contracts must be shown to have been entered into on a confession of judgment by the defendant and his surety for the fine and costs imposed on the defendant by the court on a conviction for a public offense, and the obligation of the contract must be limited to such fine and costs. The contract can not be made to embrace other considerations, such as advances to be made by the surety to the defendant, or money otherwise paid by such surety for the defendant. The surety confessing judgment with the defendant for the fine and costs becomes the transferee of the right of the State to compel the satisfaction of the fine and costs by exacting the involuntary servitude of the defendant, "who himself contracts to change masters for this purpose."—*Wynn v. The State*, 82 Ala. 55; *Smith v. The State*, 82 Ala. 40. The State itself would have no right to exact involuntary servitude of the convict for the payment or security of a mere debt, and consequently could not transfer any such right to the surety who confesses judgment for the defendant. Any obligation other than the fine and costs which might be secured by the contract, would be a debt within the meaning of the constitutional provision, that "no person shall be imprisoned for debt."

The contract under consideration on its face extends not only to the fine and costs adjudged against the defendant (the petitioner in this case), but also to advances to be made to defendant by said surety during the term of service. It is an entire contract, binding the defendant to eight months service for the payment of all of said obligations; and there is nothing in the contract, or otherwise, from which it could be made known when the service had paid the fine and costs. But, independently of this last suggestion, the contract, by reason of its having been made to extend to other obligations than the fine and costs, and because of its not being made to appear that it was entered into by defendant and his said surety on a confession of judgment for the said fine and costs, is not such a contract as would support a prosecution against defendant for his abandonment of the surety's service before the expiration of the term of service fixed by the contract.

The commingling of other obligations in the contract with the fine and costs, in contracts made under the terms of this statute, brings such contracts within the influence of the de-
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cisions of this court construing the crop-lien statute, and in which it is held that, if the crop-lien note given to secure advances includes in part articles of the class mentioned in the statute, and, in part, others not of such class, the lien is thereby vitiated as to the entire note.—*Bell & Co. v. Hurst & McWhorter*, 75 Ala. 44; *Evans v. English*, 61 Ala. 416; *Carter v. Wilson*, *Ib.* 434; *Schuessler v. Gaines*, 68 Ala. 556.

It results from what has been said that the probate judge of Pike county erred in denying petitioner the writ of *habeas corpus*, and in remanding him to the custody of the sheriff of said county; and judgment must be here entered granting the writ prayed for, unless the petitioner, on being certified of this opinion, is content to renew his application before a court of original jurisdiction.

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Indictment for Wanton Injury to Bull.

1. *Election by prosecution.*—On a prosecution for wantonly killing or injuring a bull, the first witness examined having testified that he saw the defendant shoot the bull on a Friday morning, at a place named, may be asked if he had ever seen any other injury inflicted on the bull by the defendant at any other time; and having then testified that, on the next Monday, in a different field, he saw the defendant again shoot it; the prosecution is not limited to the first shooting, but may elect to proceed for the second.

FROM the District Court of Lauderdale and Colbert.

Tried before the Hon. W. P. CHITWOOD.

The indictment in this case charged that the defendant, Richard Jackson, "wantonly killed or injured a bull, the property of John Holland." On the trial, as the bill of exceptions states, Dan Springer, the first witness introduced by the State, testified that he knew the defendant, knew John Holland, and knew the bull, which belonged to said Holland. "In reply to further questions by the State's attorney, witness stated that he had seen the bull shot; that one Friday morning in November, 1890, on the premises of Alex. Johnson in said county, in the cotton patch of said witness, he saw the defendant shoot the bull with a double-barrelled shot-gun; that he was about sixty yards distant at the time, and the defendant was only a few steps from the bull; and that he saw the bull 'draw up' when shot by the

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defendant. Defendant did not cross-examine the witness. The prosecuting attorney then asked the witness, if he had ever seen any other injury inflicted on the bull by the defendant at any other time. The defendant objected to this question, on the ground that the State had elected to proceed for the injury on Friday; which objection the court overruled, and the defendant excepted. The witness then testified that on the next Monday, following said Friday, he saw the defendant shoot said bull in the cotton patch of defendant's wife in said county. The court, of its own motion, then required the State to elect for which shooting it would proceed, and the State elected to prosecute for the said shooting on Monday; and the defendant then and there excepted. The court then excluded all the evidence as to the shooting on Friday. The witness further testified that the shooting took place about seven o'clock in the morning, and was done with a shot-gun; and he described the injury to the bull. The defendant then moved the court to exclude all the evidence relative to the shooting on Monday," and excepted to the overruling of his motion.

SIMPSON & JONES, for appellant.

EMMET O'NEAL and PAUL HODGES, with WM. L. MARTIN, Attorney-General, *contra*.

PER CURIAM.—The only question presented by the rulings of the lower court is, whether the State made an election to prosecute for one act, and afterwards proceeded to elicit evidence concerning another. The beneficent purpose of the rule which requires an election is, that the defendant shall not be prejudiced in the minds of the jury by the introduction of evidence of offenses for which he is not on trial. The term *elect* implies a knowledge of facts which go to make up two or more offenses. And while a solicitor may, by his own acts and questions, involuntarily effect an election; yet, to hold him to have elected to proceed for a certain offense, he must have learned enough to enable him to individualize the transaction, and then pursue his inquiry with a view of learning the details and particulars of the act or transaction thus individualized. To hold him to an election without going this far, would, in many cases, amount to a denial of justice.—*Peacher v. State*, 61 Ala. 22; *Smith v. State*, 52 Ala. 384; *Hughes v. State*, 35 Ala. 351; *Cochran v. State*, 30 Ala. 542; *Elam v. State*, 26 Ala. 48.

Under the rule laid down, we hold that the solicitor had
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not elected to prosecute for the shooting which took place on Friday. There is nothing in the answers of the witness to questions asked, which call for the particulars or details of that shooting. We discover no error in the record.

Affirmed.

Ex parte Russellville, in re Hurley.

Application for Certiorari, in matter of Discharge on Habeas Corpus.

1. *Municipal charter; ordinance prohibiting sale of liquor.*—A municipality, situated in a county in which a local prohibitory liquor law is of force, and authorized by its charter "to pass all laws and ordinances, and to provide for enforcing the same, for the suppression in said town of all offenders known and classed in the laws of the State of Alabama as offenses against the person, . . . offenses against public morality and decency," &c., may by ordinance prohibit the sale of spirituous liquors within its corporate limits.

2. *Name; imprisonment "until fine and costs are paid."*—A provision in a municipal charter authorizing the corporate authorities, on non-payment of the fine and costs on conviction for the violation of an ordinance, to impose hard labor or imprisonment "until the fine and costs are paid," is violative of the constitutional provision which prohibits imprisonment for debt.

THIS was an application in the name of the town of Russellville, a municipal corporation, for a writ of *certiorari*, or other remedial writ, to bring up for review an order or judgment rendered by Hon. J. M. JORDAN, probate judge of Franklin county, discharging one Arthur Hurley from the custody of the town marshal, who held him under a conviction for the violation of a town ordinance. The conviction was in the Mayor's Court, on the 2d January, 1892, and a fine of \$25 was imposed. On the same day, while Hurley was yet in the custody of the marshal, he sued out a writ of *habeas corpus*, returnable before Judge JORDAN; and on the hearing, which was had on the same day, he was discharged, the probate judge holding that the ordinance was inoperative and void.

KEY & HESTER, and WM. L. MARTIN, for petitioner.

McCLELLAN, J.—The charter of the town of Russellville invests the mayor and aldermen of that municipality

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with power "to pass all laws and ordinances, and to provide for enforcing the same, for the suppression in said town of all offenders known and classed in the laws of the State of Alabama as offenses against the person, offenses against the public peace, offenses against property, offenses against public justice and official duty, offenses against public morality and decency, offenses against public health, convenience and safety, and offenses against suffrage." And it is further provided that all persons convicted of a violation of the ordinances of the town, who fail to pay or secure such fine and cost as may be assessed therefor, "may be placed at hard labor for the town, or imprisoned, until such fine and cost are paid."—Acts 1890-91, pp. 796, 803.

By an act approved February 8, 1881, the sale, gift, or other disposition of spirituous and malt liquors and intoxicating bitters, was prohibited in beat two, known as Russellville beat, and embracing the town of Russellville, in Franklin county; and this statute is still of force, and provides heavy penalties for its violation.—Acts 1880-81, p. 392.

The offense defined and denounced by this statute is one which is "known and classed in the laws of the State of Alabama" as an offense "against public morality and decency."—Code, Part 5, Title 2, Chap. 7, Art. XIII, §§ 4036 *et seq.*

The board of mayor and aldermen of Russellville, after the charter above referred to went into effect we assume, adopted the following ordinance: "*Be it further ordained, that any person who shall give, sell, barter, or otherwise dispose of spirituous, vinous or malt liquors, or drugs or bitters the basis of which is intoxicating liquor, shall be fined not less than two, nor more than twenty-five dollars.*"

Under this ordinance, one Arthur Hurley was convicted of *selling* vinous, spirituous or malt liquors in said town, fined within the limitation of the ordinance quoted above, and failing to pay the fine and cost, was in the custody of the marshal of the town pending sentence to imprisonment or hard labor, when he applied to the probate judge of Franklin county for a writ of *habeas corpus*, and prayed to be discharged upon a hearing thereof, on the ground that "said mayor, in convicting the petitioner, exceeded his jurisdiction, in that the charter of the town of Russellville does not confer any authority upon the mayor and councilmen, or any other person, to pass an ordinance prohibiting the sale of whiskey in said town." The writ issued, and on the hearing petitioner was discharged. The town of Russellville now prays this court "for a writ of *certiorari*, or other appropriate remedial writ," to bring that proceeding before

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this court, and requiring the said judge of probate to vacate and annul the judgment, &c., upon said writ of *habeas corpus*.

The judgment of the probate judge can not be sustained on the ground upon which it was invoked and rested. The mayor and aldermen of the town of Russellville were, in our opinion, empowered and authorized to prohibit the sale of whiskey within the limits of the municipality. Such sale under the local prohibitory act, to which reference has been made, was an offense known and classed in the laws of the State as one against public morality and decency; and the charter, as we have seen, expressly authorizes the mayor and aldermen to pass all ordinances for the suppression of all offenses so known and classed. Whether this authorization was efficient in respect of *all* offenses which are known and classed in our laws as violative of public morality and decency, we need not inquire or decide; it is at least so far a valid delegation of power to the municipality as to cover all such offenses as fall within the ordinary police power of towns and cities; that is, if the offense attempted to be suppressed by the municipality be not only one classed as opposed to public morality and decency in the laws of the State, but also one control over which by means of the exercise of the corporate police power might have been specifically granted to the town, it is efficiently delegated by reference to it as an one known, in the laws of the State, as an offense against public morality and decency; and as the General Assembly might unquestionably have invested the mayor and aldermen of Russellville with power to prohibit and punish the sale of intoxicating liquor, in conservation of the peace and good order of the town, it follows that a delegation of such power in respect of a certain class of offenses, of which this is one, is valid as to this one, whether so or not as to others so classed.

It seems from this record that the writ of *habeas corpus* was sued out soon after Hurley was adjudged guilty and the fine imposed, and before he had *failed* to pay the fine and cost in the sense of authorizing his commitment to hard labor or prison "until such fine and cost are paid;" and the discharge which he seeks is from this temporary custody between conviction and such failure to pay which is allowed before sentence to hard labor or imprisonment for non-payment, to afford him an opportunity of satisfying the judgment, and not from the judgment to hard labor or imprisonment which might ultimately have been imposed. Hence it is not necessary that we should decide whether such ultimate judgment could have been rendered—that is,

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whether the legislative provision for commitment to hard labor or imprisonment in case of failure to pay fine and cost is valid. It is to be noted, however, in this connection, that the act does not contemplate hard labor or imprisonment as alternate punishment, or as punishment to be imposed *in lieu* of the fine, but as *means of coercing* the payment of the fine; and while it may be that the defendant could be put to hard labor, at a reasonable rate of compensation, for a sufficient length of time for his earnings to equal the fine and cost, we are inclined to the opinion that, in so far as the provision in question undertakes to authorize his *imprisonment* until the fine and costs are paid, it is inoperative and void. Otherwise the imprisonment might be for a period as indefinite as the duration of the defendant's life, and have much in common with imprisonment for debt, which the organic law inhibits, and hence involve violence to the policy of our jurisprudence.

The order of the Probate Court discharging Arthur Hurley is vacated and annulled, and his petition for the writ of *habeas corpus* is here denied. The rights of the town of Russellville in respect of the custody of the defendant Hurley are the same as if he had casually escaped from the town marshal.

Petition for *certiorari* granted, &c.

Ex parte Sloane.

Application for Bail on Habeas Corpus.

1. *Homicide; words of insult or provocation.*—Mere words of provocation, however insulting or offensive, but not accompanied with an assault, or acts evidencing an intention to resort to immediate use of force, can never reduce a homicide from murder to manslaughter; but they may, under some circumstances, reduce the killing to murder in the second degree.

2. *Right to bail.*—A person who is in custody under a charge of murder, is entitled to bail as a matter of right, unless the proof is evident, or the presumption great, that he is guilty of murder in the first degree.

3. *Same; revision on appeal.*—On application for bail by a person who is in custody under a charge of murder, it is a safe rule to refuse bail when the judge would sustain a capital conviction by a jury on the same evidence, and to admit to bail where the evidence is of less efficacy; and if bail is refused, a revisory court should refuse to interfere, unless it is clear that the lower court erred in its judgment.

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APPLICATION by William Sloane for the writ of *habeas corpus*, to procure his discharge, or admittance to bail, from the custody of the sheriff of DeKalb county, on an indictment for the murder of James Morton; bail having been refused by Hon. L. L. COCHRAN, the probate judge of said county, and an exception reserved by the prisoner to that decision. This court declines to discuss the facts connected with the killing, and a statement of them is not necessary to an understanding of the points decided.

L. A. DOBBS, and BRICKELL, SEMPLÉ & GUNTER, for the petitioner, contended that he was entitled to bail, as a matter of right, because the facts set out in the bill of exceptions showed that he was not guilty of murder in the first degree. They cited *Ex parte Bryant*, 34 Ala. 270; *Ex parte McAnally*, 53 Ala. 475; *Ex parte Banks*, 28 Ala. 99; *Ex parte Howard*, 30 Ala. 46; *Lumm v. State*, 3 Ind. 293; *Field v. State*, 52 Ala. 348; *Mitchell v. State*, 60 Ala. 26; *Com. v. Webster*, 5 Cush. Mass. 306; 18 Amer. Dec. 780; *Nye v. People*, 35 Mich. 16; *Hornsby v. State*, 94 Ala. 55.

COLEMAN, J.—Section 3725 of the Code reads as follows: “Every homicide perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing, . . . is murder in the first degree; every other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree.”

The declaration of rights in the Constitution of the State, section 17, provides “that all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption is great.” Murder in the first degree may be punished capitally. The four ingredients necessary to constitute murder in the first degree—willful, deliberate, malicious and premeditated—have each often been the subject of judicial construction by this court, as well as by other tribunals. We will not undertake it again.—*Lang v. State*, 84 Ala. 1; *Mitchell v. State*, 60 Ala. 26; *Hornsby v. State*, 94 Ala. 55; 10 So. Rep. 522; *Hamill v. State*, 90 Ala. 582. Words of provocation, not accompanied with an assault, or acts evincing an intention to resort to immediate use of force, can not reduce the killing from murder to manslaughter. The record shows that there was no assault made upon the defendant, and no act indicating an intention to resort to the use of immediate force against him by the deceased.

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We are of opinion that the words or conduct of another, under some circumstances, may be of such an insulting or provoking character as to kindle sudden passion, and provoke immediate resentment, even to the taking of life. *Watson v. State*, 82 Ala. 12. If the insult or provocation is of such a character as is reasonably calculated to kindle passion and provoke sudden resentment, and if the proof shows that the insult or provocation had this effect, and the homicide is traceable solely to the influence of passion kindled by the insult or provocation, then such killing is not willful, malicious, deliberate and premeditated, and is not murder in the first degree, but murder in the second degree. Mere words, however offensive, can not reduce the offense to manslaughter.

On the other hand, the extent and character of the insult, or provocation offered, considered in connection with the state of feeling between the parties, and other attending circumstances, may be such as to justify the conclusion that the words or conduct of deceased were seized upon as a pretext to execute a previously formed design to take life. Although the design to take life may have been executed instantly after being formed, if it proceeded from willfulness, malice, deliberation and premeditation, the offense would be murder in the first degree.—*Hornsby v. State*, 94 Ala. 55; 10 So. Rep. 522. The degree of the offense—that is, whether the fatal shot was the result of giving away to sudden passion, reasonably excited, and in resentment of the insult or provocation, or in execution of a formed design, as explained and qualified—is a question of fact to be determined by the jury from all the circumstances in the case. A discussion of the facts might unduly prejudice the defendant when put upon his trial.

It is held in this State, as a safe rule by which the question of bail must be determined, when a malicious homicide is charged, to refuse bail in all cases where a judge would sustain a capital conviction, if pronounced by a jury, on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail; and in instances where the evidence is of less efficacy, to admit to bail. This rule was declared in *Commonwealth v. Keeper of the Prison*, 1 Ashmead, and adopted by this court as a proper construction of a similar clause in our Constitution.—*Ex parte Bryant*, 34 Ala. 276; *Ex parte Nettles*, 58 Ala. 275; *Ex parte McAnally*, 53 Ala. 498. It is equally well settled in this State, "that when the question is presented to a revisory court, much is due to the judgment of the primary tribunal. The

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witnesses are personally before it, and the examination is usually had near the scene of the alleged offense, and in the midst of the circumstances attending the transaction. In all investigations of criminal accusations, much depends upon the manner in which the witnesses testify, the feeling of partiality or prejudice they may manifest, and their general demeanor. These the primary court has the opportunity of observing, and it should be clear that it has erred in its judgment, or a revisory court should abstain from interference."—*Ex parte McAnally, supra*; *Ex parte Nettles, supra*.

Applying these principles to the facts as presented in the record, we feel it our duty to deny the application for bail. Application denied.

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Indictment for Selling Liquor Unlawfully.

1. *Sufficiency of indictment; violation of local prohibitory law.*—Under an indictment charging, in the words of the general statute, that the defendant "sold spirituous, vinous or malt liquors, without a license, and contrary to law" (Code, § 4037), a conviction may be had on proof of a sale of intoxicating bitters in violation of a local prohibitory law.

2. *What are "intoxicating bitters, mixture, decoction or compound."* Under a local law prohibiting the sale of any "intoxicating liquors, or any intoxicating decoction, mixture, compound, or bitters," a conviction may be had on proof that the defendant sold a preparation called "Strengthening Cordial," or "Ginger Tonic," which contained alcohol in sufficient quantity to produce intoxication, and which was used by purchasers as a beverage, producing intoxication; and the fact that the articles were prepared and sold by the defendant in good faith as medicines, in ignorance of their intoxicating qualities, or honestly believing that they were not intoxicating, is no defense.

FROM the Circuit Court of Clarke.

Tried before the Hon. WM. E. CLARKE.

JOHN Y. KILPATRICK, for the appellant, cited and relied on *Carl v. State*, 87 Ala. 17; *Knowles v. State*, 80 Ala. 9.

WM. L. MARTIN, Attorney-General for the State, cited Code, § 4037; *Williams v. State*, 91 Ala. 14; *Carl v. State*, 89 Ala. 93; *Carson v. State*, 69 Ala. 235; *Com. v. Kimball*,

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24 Pick. 366; *Com. v. Hallett*, 103 Mass. 452; 2 Whart. Cr. Law, 9th ed., 1506.

THORINGTON, J.—Appellant was convicted under an indictment charging him with selling spirituous, vinous or malt liquors, without a license, and contrary to law.

The testimony for the State, as the bill of exceptions recites, tended to show that appellant sold “McLean’s Strengthening Cordial” and “Ginger Tonic”; that they were articles containing sufficient alcohol to produce intoxication; that persons bought them of appellant for the purpose of using them as a beverage “and did so use them and get drunk on them”; that appellant kept on hand a large quantity of said articles, which he sold regularly in quantities less than a quart. Appellant’s testimony tended to show that he sold said articles in good faith, as medicines; that they were put up for medical purposes, and used as such, and did not contain sufficient alcohol to produce intoxication, and that he did not “intentionally sell them as a beverage or intoxicant to any one.”

The indictment was found under a special prohibitory statute relating to the counties of Clark and Limestone. Acts 1880–1, p. 170. The first section of the act declares it unlawful for any person to “distill, brew, or otherwise manufacture, or sell, give away, or otherwise dispose of any vinous, spirituous, malt, or other intoxicating liquors, or any intoxicating decoction, mixture, compound, or bitters, whatever, in any quantity, or for any use or purpose whatever, scientific, medical, or other use or purpose, within the limits of the counties of Clarke and Limestone.”

The only exceptions declared in the statute are, that it shall not apply to the use of wine for sacramental purposes, nor to the social or domestic use of such liquors in private residences, nor to the administering of such liquors, or compounds thereof, by regularly licensed physicians, when necessary, in their actual and legitimate practice.

The penalty prescribed for a violation of the statute is a fine of not less than one hundred, nor more than five hundred dollars, and also imprisonment in the county jail, or hard labor for the county, for not more than six months. Defendant was convicted and fined two hundred and fifty dollars. The exceptions reserved on the trial by appellant are confined to the refusal of the court to give to the jury certain charges, or instructions, requested by him in writing.

A defendant may be convicted, under an indictment such as this, on proof of a sale in violation of any special or local Vol. 95.

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law prohibiting the sale of liquor—Code of 1886, § 4037; *Williams v. State*, 91 Ala. 14. Such a statute, though local in its nature and operation, is a public statute, of which the courts are required to take notice without being pleaded. *Carson v. The State*, 69 Ala. 235.

None of the charges asked by appellant, and refused by the court, present a defense within any exception contained in the statute. They are based on the hypothesis, that if the tonic and cordial sold by defendant were medical preparations, and were sold by him as such in good faith, and not for use as a beverage, their misuse by the purchaser, though producing partial intoxication, does not render defendant liable under the statute.

Whether or not the cordial and tonic confessedly sold by appellant were medical preparations, or an "intoxicating decoction, mixture, compound or bitters", was a question of fact for the jury, and the bill of exceptions states that the testimony for the State tended to show such was their nature. If so, the special statute prohibits their sale for medical purposes, in express terms, whether such sale is made in good faith or not. By the provisions of this statute, it is *the fact of a sale* of the prohibited article, and not the *intent with which the sale is made*, the statute denounces. The specific act of selling intoxicating bitters, or other compounds such as are described in the statute, constitutes the offense, irrespective of defendant's belief, motive or intention. Ignorance of the character of the mixture, or even belief that it is not intoxicating, based on a mistake of fact, is no defense under this statute. And it has been declared generally, that where there is no exception, taking out of the general provision of the statute sales made in good faith for medical purposes, the fact that the article was sold in good faith as a medicine, does not operate to acquit the defendant of a violation of the statute, if it be in reality intoxicating.—*Carson v. State*, 69 Ala. 235; *Carl v. State*, 89 Ala. 93; *Com. v. Kimball*, 24 Pick. 366; *Com. v. Hallett*, 103 Mass. 452; 2 Whart. Cr. Law, §§ 1506, 1507. In *Carson v. State*, *supra*, it is said: "The application of any other rule would be fraught with difficulty, if not impracticability. The frequency of imposture on the one hand, and abuse on the other, would be imminent."

Under this indictment charging the sale of spirituous, vinous or malt liquors, the real inquiry was whether the tonic or cordial sold by the defendant contained sufficient spirituous, vinous or malt liquors to make the same an "intoxicating mixture, compound or bitters"; and the rule for

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determining that question has been declared by this court as follows: "If the liquors and other ingredients are used and mixed in such manner and proportions as to counteract the intoxicating force and character of the liquor, fairly constituting a medicine, and rendering its use as a beverage practically impossible, it does not come within the statute. On the other hand, if the liquor is the predominant element, or sufficiently retains its intoxicating qualities so as to render the mixture reasonably susceptible of use as a beverage, or of substitution for the ordinary intoxicating drinks, it is within the statutory prohibition."—*Carl v. State*, 89 Ala. 93. The tendency of the evidence for the State was to show that the tonic and cordial sold by appellant contained sufficient alcohol to render them intoxicating in their nature and effects. All the charges asked by appellant ignore entirely that question, and assert his right to an acquittal, if, in good faith, he sold them as medicines, and not as beverages or intoxicants. They are all opposed to the principles laid down in the cases herein cited, and there was no error in their refusal.

Affirmed.

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Indictment for Shooting along or across Public Road.

1. *What is a public road.*—A public road can only be established by order of the Commissioners Court, or acquired by the public by dedication or prescription; and a road which, turning out from the main road at a point where a temporary obstruction is sometimes caused by a sand-bed, runs parallel with it for a few hundred yards, and returns into it beyond the sand-bed, does not constitute a "public road" under the statute which makes it a misdemeanor to shoot along or across a public road—Code, § 4095.

From the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

The indictment in this case charged that the defendant "unlawfully discharged a pistol along or across a certain public road known as the Mount Meigs road;" being found guilty and fined \$10, which was not presently paid, he was sentenced to hard labor for the county for ten days, and an additional term of eight months for the costs, which were ascertained to be \$213.50. "On the trial", as the bill of ex-

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ceptions states, "the State introduced testimony tending to prove that the defendant, within twelve months before the finding of the indictment, did shoot along or across a public road as charged in the indictment, to-wit, the Mount Meigs road, at a place or point about two miles from the city of Montgomery, and did also shoot along or across what was designated by the witness as a "turn-out road," which was travelled and used by the public in order to avoid a sand-bed which at times was formed in said Mount Meigs road, at a place or point about six miles from the city of Montgomery, and which, at such times, was a temporary obstruction or impediment to travel on said public road; that by reason of said sand-bed said 'turn-out road' was travelled for about a half mile, parallel with, and distant from said Mount Meigs road from twenty to forty yards. The defendant then introduced evidence tending to show that he did no shooting along or across said Mount Meigs road, at any point or place whatever, but that while traveling along said 'turn-out road', about six miles from Montgomery, and when at a distance of about forty yards from said Mount Meigs road, he shot off his pistol one time in an opposite direction from the road; that said 'turn-out road' ran through the lands of one Taylor, and was used temporarily by the public on account of the obstruction and inconvenience sometimes caused by the sand-bed; that the land through which said 'turn-out road' ran was inclosed by the owner soon after said shooting, and had not since been used for the purposes of travel, the travel being since continued on the Mount Meigs road. This being all the evidence in substance, the court charged the jury, that if they were satisfied from the evidence, beyond a reasonable doubt, that the defendant, within twelve months before the finding of the indictment, shot a pistol along or across the 'turn-out road' as described in the evidence, then he would be guilty"; also "that to make a short turn-out, necessitated by obstructions, a public road which would render the defendant guilty as charged, it need not be established by the Board of Revenue, nor by any other act or use, except that the public generally used and travelled it." The defendant excepted to each of these charges, and also to the refusal of several charges asked by him in writing.

A. A. WILEY, H. C. BULLOCK, and GORDON MACDONALD, for appellant, cited Elliott on Roads and Streets, pp. 2-3, note 2; *Oliver v. Loftin*, 4 Ala. 240.

WM. L. MARTIN, Attorney-General, for the State.

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COLEMAN, J.—The defendant was indicted and convicted for violating section 4095 of the Penal Code, which provides that “Any person who discharges a gun, or any other kind of fire-arms, along or across a public road, must on conviction be fined,” etc. The material question is, whether the road along which defendant was travelling at the time he discharged the pistol, was a public road, within the meaning of the statute. The evidence sufficiently appears in the statement of the facts of the case.

Section 1389 of the Code declares, “No public road can be established, changed, or discontinued, except on application to the court of County Commissioners.” Section 4122 of the Code provides, that to change a public road is a misdemeanor, except by order of the Commissioners Court, unless it straightens the same through inclosures, or renders it more convenient for the public. This section does not authorize any change of a public road, either to straighten it, or to render it more convenient for the public, but simply provides that, when changed for this purpose, it is not indictable.

There is no evidence to show that the “turn-out road”, as it is designated in the record, and from which the pistol was fired, was established by the County Commissioners. *James v. Hendree*, 34 Ala. 490. In *Mills v. The State*, 20 Ala. 88, a public road is defined to be “a road dedicated to and kept up by the public, as contra-distinguished from private ways, which are not so kept up.” In the case of *Kennedy v. Williams*, 87 N. C. 6, it is said: “A public highway is one under the control and kept up by the public, and must either be established in a regular proceeding for that purpose, or be generally used by the public for twenty years, or dedicated by the owner of the soil and accepted by the proper authorities.”—9 Amer. & Eng. Encyc. of Law, p. 362, and note. In *Elliott on Roads and Streets*, ch. 1, pp. 2-5, and notes, it is said: “A public road, in legal contemplation, is one over which the public have a general right of passage. No matter whether established by prescription or by dedication, or under the right of eminent domain, it is a highway, if there is a general right to use it for travel. Where the statute declares what shall constitute a highway, it governs, and a way not answering to the requirements of the statute can not be rightfully regarded as a highway.”

It is a general principle of law, that penal statutes must be construed strictly. The evidence shows that, at times, a sand-bed would form in the public road, causing a tempo-

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rary obstruction or impediment, and while this continued the public used the "turn-out road" to avoid the sand-bed. The "turn-out" ran parallel to the public road, through the lands of one Taylor. There is no evidence that the "turn-out road" was established by the court of County Commissioners, or that it had been acquired by the public by prescription or dedication. We are of opinion that the court erred in its construction of the law, and under the evidence the defendant was entitled to the general affirmative charge in his favor.

Reversed and remanded.

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Indictment for Embezzlement against Bank President.

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1. *Sufficiency of indictment.*—An indictment against the president or other officer of a bank incorporated under the laws of this State, in the form prescribed by the Code (Form No. 39; Code, p. 270), charging that he, being such officer, "embezzled, or fraudulently converted to his own use, money to about the amount of \$558, which was in the possession of said bank, or deposited therein," is sufficient to authorize a conviction for the embezzlement or fraudulent conversion of money belonging to the bank itself, or deposited therein on general or special account; and though the money was a special deposit, it is not necessary to aver the name of the owner.

2. *Embezzlement by bank officer.*—Under statutory provisions (Code, § 3796), a bank officer may be convicted of embezzling, or fraudulently converting to his own use, money belonging to the bank, or deposited therein, although his possession and control was not exclusive of the other officers; it is immaterial whether his acts were perpetrated secretly or openly, with or without the assent and concurrence of the other officers; if consummated under the guise of a fraudulent loan, made with the assent of the other officers, and regularly credited on the books as an ordinary business transaction, this would not eliminate the criminality of the act; and the fraudulent intent may be inferred by the jury from the misappropriation of the funds.

3. *Same; evidence.*—In a criminal prosecution against a bank officer for embezzlement, as in other cases involving the question of fraud or fraudulent intent, great latitude is allowed in the range of the evidence, and it is permissible to prove other acts and transactions of similar character, at or about the same time, on the part of the defendant and the other officers, amounting to a misappropriation of the funds of the bank, though entered on its books as loans to each of them, culminating in its failure and assignment at the end of the year; also, that the defendant and his brother, president and vice-president, owned nearly all the stock of the bank, drew out of it during the year, as loans, amounts equal to their stock, and were in-

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solvent when the bank failed; also, that their respective wives each owned a valuable estate, including a plantation which the brothers cultivated jointly during the year, and for which advances were drawn from the bank as loans about equal to its full value. All of this evidence, though relating to acts which might constitute several criminal offenses, is within the legitimate range of the inquiry, tending to show "a long course of unlawful dealing in the affairs and management of the bank, of which defendant could not have been ignorant, and which could not have occurred without his participation, and may shed light on the motives and intent influencing him in the admitted appropriation to his own use of the money drawn out by him on his several checks, including the one on which the indictment is based."

4. *Same.*—The fact that the defendant's brother, who was the vice-president of the bank, kept a private box of papers in the bank, and secretly removed it without the defendant's knowledge, the night before the bank made an assignment, is not relevant or admissible as evidence for any purpose, and its admission is error.

5. *Charge given, but not handed to jury.*—If an erroneous charge, requested by the defendant, is marked *Given* by the presiding judge, but by mistake is placed among the charges refused, and does not go into the hands of the jury, there is nothing in this of which the defendant can complain.

6. *Refusal of new trial.*—The overruling of a motion for a new trial in a criminal case is not revisable, though an appeal is given by statute in a civil case.

FROM the Circuit Court of Bullock, on change of venue from Barbour.

Tried before Hon. JESSE M. CARMICHAEL.

The defendant in this case was indicted for embezzlement as a bank officer, was convicted, and sentenced to the penitentiary for the term of three years. The indictment was found at the June term, 1891, and contained four counts. The judgment-entry recites that the defendant "interposed a demurrer to the indictment, as shown by the record, which demurrer was overruled by the court;" but the grounds of demurrer are nowhere stated. On the trial, the State elected to proceed on the second count of the indictment, which charged that William N. Reeves, "an officer and president of the *John McNab Bank*, a bank incorporated under the laws of this State, embezzled, or fraudulently converted to his own use, money to about the amount of \$558.34, which was in the possession of said bank, or deposited therein; against the peace," etc. Issue was joined on the plea of not guilty. The opinion of Judge THORINGTON contains a very full statement of the evidence, and renders any further statement unnecessary. In addition to the exceptions to evidence, stated in the opinion, the defendant reserved exceptions to the refusal of each of the following charges, asked by him in writing:

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(1.) "If the jury believe from the evidence that the defendant, at the time he received the \$558.34 from the bank, had no intent to injure or defraud the bank, then they will find him not guilty; and if, from all the evidence, they have a reasonable doubt of the fact that, at the time he received the money, he had the intent to embezzle the same, or fraudulently convert the same to his own use, they must acquit him." (2.) "If the jury believe from the evidence that when the defendant received the \$558.34 from the bank, he received it as a loan, to be repaid out of the proceeds of the crop to be grown on the plantation in Russell county, and had good reason to believe, and did believe, that said sum, and all other sums advanced to him by the bank during the year for the use of the plantation, would be repaid to the bank from said crops; and that he had, at the time the several sums were received by him from the bank, no intent to embezzle the same, or fraudulently convert the same to his own use,—then their verdict must be for the defendant."

(3.) "If the jury, on consideration of all the evidence in the case, can reasonably conclude that the defendant, at the time he received the \$558.34 from the bank, had no intent of embezzling the same, or fraudulently converting it to his own use, then it is their duty to acquit him." (4.) "When a good or bad motive for doing an act can be imputed to the person doing the act, the law says the good motive must be imputed, if the same can be done from the evidence reasonably to the satisfaction of the jury; and before the jury can say that the defendant in this case is guilty, they must be satisfied from the evidence, beyond all reasonable doubt, that when he received the money from the bank he intended to embezzle it, or fraudulently convert it to his own use; and if they have a reasonable doubt, growing out of the evidence, that the defendant at the time intended to embezzle the same, or fraudulently convert it to his own use, they must find him not guilty."

The action of the court in reference to these charges, and the defendant's exception to that action, are thus stated in the bill of exceptions: "The above charges, numbered from one to four inclusive, with the addition of the words, '*and used it*,' referring to the money after it was obtained, were given by the court. The court refused to give said written charges, and the defendant excepted to *such* (?) refusal."

The defendant requested also the following charges in writing, and excepted to their refusal as stated:

(5.) "The law makes all money, put into the bank on general deposit, the absolute property of said bank, and au-

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thorizes and empowers said bank to use said money as its own in any lawful way; and if the jury believe from the evidence that the proper authorities or officers of the bank consented and agreed to lend said sum of \$558.34 to defendant, in the usual way and manner of doing business by said bank, they must find the defendant not guilty."

(6.) "If the jury believe from the evidence that when the defendant discounted the draft for \$7,480, the same was so discounted by the bank with the full knowledge and consent of the officers and managers of its affairs, and by authority and consent of a majority of the board of directors of said bank, and he paid to the bank the interest or discount on said draft in the usual and customary way; and that the money arising from the discount of said draft was used by the defendant *bona fide* in defraying the expenses of running the Russell county plantation during the year 1890; and that the cotton crops to be grown on said plantation during that year were to be used by said defendant in repaying said amount to the bank; and that the defendant believed, and had good reason to believe, that said cotton crops to be raised that year on said plantation would be sufficient to repay said amount; and that defendant, by reason of the failure of the cotton crop on said plantation during that year, could not repay said amount to the bank in full; and that said defendant, at the time said draft was discounted, had no intent to embezzle the same, or fraudulently convert it to his own use,—then they must acquit the defendant."

(7.) "If the jury believe from the evidence that the \$558.34 was loaned by the bank to W. N. and J. H. Reeves in good faith, and in the regular course of business, then they must acquit the defendant."

(8.) "Although the jury may believe from the evidence that the affairs of the bank were not managed with the highest degree of care and skill, yet, if they believe that the \$558.34 was loaned by the bank in good faith to said W. N. and J. H. Reeves, and in the usual and customary way, they must acquit the defendant."

(9.) "Before the jury can convict the defendant in this case, they must believe from the evidence, beyond a reasonable doubt, that the money paid by the bank on the check for \$558.34 was paid out of money which was placed in and held by the bank as a special or specific deposit."

(10.) "If the jury believe from the evidence that the check for \$558.34 was paid by the bank out of money held by it on general deposit, they must find the defendant not guilty."

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(11.) "If the check for \$558.34 was drawn on the bank by the defendant, and the money on the same was paid to him by the bank with the knowledge and consent of the officers and managers of the affairs of the bank, and there was no fraud practiced by the defendant in obtaining said money, then the jury will find him not guilty."

(12.) "If the jury believe from the evidence that the defendant, when he drew the check for \$558.34 in favor of Ex. Tucker, honestly believed that he had the right to draw the check and use the money as the evidence shows it was used, then they must find him not guilty."

(13.) "If the jury believe from the evidence that the check for \$558.34, drawn by the defendant on the 23d June, 1890, was known to and authorized by the other ministerial officers of the bank, they must find defendant not guilty."

(14.) "If the jury believe the evidence in the case, they must find the defendant not guilty."

Each of these charges was refused by the court except the 12th, which was marked *Given*, and intended to be given, but by mistake was placed among the charges refused, "and was not read to the jury, nor considered by them in making up their verdict; and defendant excepted to the action of the court in respect to said charge." The bill of exceptions adds: "But the court gave substantially the same charge, generally and specially, at the request of the defendant."

G. L. COMER, HENRY R. SHORTER, and WATTS & SON, for appellant.—(1.) The statute is aimed at the embezzlement or fraudulent conversion, by a bank officer, (1) of money belonging to the bank, (2) of money in the possession of the bank, or (3) deposited therein. The latter words can only refer to money on special or specific deposit, for money deposited on general account becomes at once the property of the bank, and creates the relation of debtor and creditor between the bank and the depositor.—Morse on Banking, vol. 1, § 289; *Wray v. Tuskegee Insurance Co.*, 34 Ala. 58; *Wright v. Paine*, 62 Ala. 340; *Henry v. Northern Bank*, 63 Ala. 540; *Thompson v. Riggs*, 5 Wall. 678; *Bank v. Miller*, 10 Wall. 152; 16 Wall. 483; *People v. Hone*, 2 N. Y. 387; *Com. v. Sterns*, 2 Metc. Mass. 343; *Com. v. Libby*, 11 Ib. 64; *Nobles v. State*, 59 Ala. 73. The indictment does not follow the words of the statute, omitting entirely "money belonging to the bank," and thus narrowing the charge to the embezzlement of money on special or specific deposit; and as such, the names of the owners, or depositors, should have been stated. (2.) If the indictment was sufficient to au-

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thorize a conviction for the embezzlement of money on special deposit, there was no evidence to sustain it; and if the evidence was sufficient to support a conviction for the embezzlement of money belonging to the bank, or deposited with it on general account, there was a fatal variance between it and the charge in the indictment. (3.) It is submitted that the evidence fails to establish any embezzlement at all, or fraudulent conversion, which involves secrecy or concealment. Every transaction shown by the evidence was made openly, with the knowledge and assent of the proper officers of the bank, and was correctly entered on the books of the bank like other regular business transactions, negating any fraudulent intent.—2 Russ. Crimes, 181-84; 2 Bish. Crim. Law, § 209; *State v. Mayo*, 30 Ala. 32; *Nobles v. State*, 59 Ala. 73. (4.) The prosecution having elected to proceed on the second count, which charged the embezzlement of \$558.34, as shown by the check of June 23d, 1890, the evidence ought to have been confined to that single transaction; yet the court allowed evidence of numerous other transactions, each of which might have been the foundation of a separate criminal prosecution.—*Mayo v. State*, 30 Ala. 32; *Gassenheimer v. State*, 52 Ala. 312; *Smith v. State*, 52 Ala. 384; *Bass v. State*, 63 Ala. 108. (5.) Much evidence was admitted by the court, outside of these other alleged criminal transactions, which was entirely irrelevant to any issue in the case; as, the amount of stock in the bank held by the defendant, his brother, and the other officers, and the amounts drawn out by each of them; the amount of property owned by the defendant's wife and his brother's wife respectively, and their own insolvency; the location of the doors of the bank, in connection with other parts of the building; the removal by the defendant's brother, without his knowledge or assent, of a box of private papers from the bank building, &c. Each part of this evidence was irrelevant, and its admission was error.—*Carson v. State*, 50 Ala. 134; *Mitchell v. State*, 60 Ala. 26.

WM. L. MARTIN, Attorney-General, for the State.—(1.) The indictment is in the form prescribed by the Code, and is therefore sufficient.—*Huffman v. State*, 89 Ala. 33; *Lowenthal v. State*, 32 Ala. 589. Its legal effect is to charge each and every act denounced by the statute, and authorize a conviction on proof of any one of those acts. Moreover, the record does not show what grounds of demurrer, if any, were specified; and this court will presume that none were specified. (2.) The evident purpose of the statute is to protect

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the money, property and effects belonging to the bank, or in its possession, or deposited therein, against the ravages of its officers and agents, to whom the care and management of its affairs are necessarily intrusted; to preserve such funds inviolate for the legitimate uses and purposes of the bank, its creditors, depositors and stockholders. The officers of the bank are the mere custodians and managers of its funds, for the purposes of the corporation as prescribed by law, and are without authority to use or lend its moneys except as authorized by law.—Code, § 1525. The statute has never received a judicial construction in any reported case, but a similar statute of the United States has been construed in the cases of *United States v. Taintor*, 11 Blatch. C. C. 374, and *United States v. Harper*, 33 Fed. Rep. 471–81. See, also, 6 Amer. & Eng. Encyc. Law, 483–86. These authorities show that the “intent to injure or defraud,” as the words are used in the statute, means nothing more than that general intent to injure or defraud, which, in contemplation of law, always arises when one willfully and intentionally does an act which is illegal or fraudulent, and which, in its necessary or natural consequence, must injure another; that the intent to injure or defraud is conclusively presumed, when the unlawful act was knowingly committed, and injury to another resulted, because no one can be heard to say that he did not intend the natural or necessary consequence of his own willful act. (3.) In such a case as this, necessarily involving a charge of fraud, the prosecution is not limited to the particular act charged, but may adduce evidence of other similar acts as relevant to the question of intent. A single act of conversion, isolated and unexplained, may amount to nothing; while a series of such acts, scrutinized in the light of all the attending facts and circumstances, may establish a systematic plan of plunder with fraudulent intent.—*Stanley v. State*, 88 Ala. 154; Whart. Crim. Ev., §§ 38, 46; 6 Amer. & Eng. Encyc. Law, 501. That the defendant’s financial condition may be shown, see 6 Amer. & Eng. Encyc. Law, 503

THORINGTON, J.—The statute under which the defendant was indicted declares, that “Any officer, agent, clerk, or servant of any bank incorporated under any law of this State, who embezzles, or fraudulently converts to his own use, or fraudulently seceretes with intent to convert to his own use, any money, property or effects, belonging to, or in the possession of such bank, or deposited therein, must be punished, on conviction, as if he had stolen it.”—Code, § 3796.

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This statute first appeared in the laws of this State in the Code of 1852, but there it embraced in its terms private bankers, commission-merchants, factors, brokers, attorneys and other agents. It was brought forward into the Revised Code of 1867, in the language we now find it in the Code of 1886, having been successively carried forward from the Revised Code into the Code of 1876, and from that into the present Code.

Counsel have cited no decision of this court construing the provisions of this statute, nor have we been able to discover any after careful investigation. An analysis of the statute shows that, in order to constitute an offense against its provisions, there must exist the following concurring facts: (1.) The party accused must be an officer, agent, clerk, or servant of a bank incorporated under the laws of this State. (2.) The money, property or effects must have belonged to, or been in the possession of, or been deposited in such bank. (3.) The money, property, or effects must have been embezzled by the accused, or fraudulently converted to his own use, or secreted by him with intent to convert to his own use.

For indictments under this, and other statutes, the Code prescribes forms, and declares that they shall, in all cases in which they are applicable, be deemed sufficient.—Code of 1886, vol. 2, § 4899, Form No. 39. The form laid down for cases of this character omits the words in the statute “belonging to such bank,” and also the words “or fraudulently secretes with intent to convert to his own use,” and provides only for the embezzlement, or fraudulent conversion of money, property, or effects, which were *in the possession of such bank, or deposited therein*. Why this is so does not appear, except as indicated by the language of said section 4899, from which language it may be inferred that a form analogous to that given in No. 39 was intended to be used for charging offenses coming within the omitted language, instead of within the language found in said form.

The indictment in this case, following the form in the Code, charges that the money, property or effects “were in the possession of, or deposited in the bank.” For objection to the sufficiency of the indictment counsel for appellant insist, that the statute, in the use of the words “money, property and effects belonging to the bank,” contemplates money, property and effects of which the bank is the owner, and by the words, “in possession of such bank, or deposited therein,” it refers necessarily to money, property or effects belonging to others than the bank; that all money deposited

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generally, *eo instanti*, becomes the property of the bank, the relation of debtor and creditor immediately arising upon the general deposit being made; that, therefore, the words "in possession of such bank, or deposited therein," can only refer to special deposits of money, property or effects, where the title and ownership remain in the depositor, the bank becoming the bailee of the depositor; and from this it is argued that the indictment is defective in not averring the ownership of the money it alleges defendant embezzled.

Any sound interpretation of this statute must take into account the nature and fundamental objects of banks, and the fact that the statute refers to incorporated banks, and must dissociate from the legal entity, the bank itself, the individuals who happen to be its officers, agents or servants.

In Morse on Banks and Banking, vol. 1, § 41 (b), in speaking of these objects, it is said: "The chief of these being to provide a place of safety in which the public may keep money and other valuables, and to lend its own money, and that of others deposited with it (unless specially deposited), for a profit, and to act as agent in the remission and collection of money. If it is by its organic law a bank of issue, it has one more fundamental purpose, namely, to provide the public with a convenient currency in the shape of promissory notes intended to circulate as money."

The business of this and other countries is so largely conducted and influenced by the banks, and those dealing with them, as well as the stockholders themselves, are compelled, in the nature of such business, to repose in their officers such implicit confidence, it becomes of the highest consideration that every reasonable safeguard should be provided by the law to secure fidelity on the part of bank officials and the proper exercise of the extraordinary privileges accorded to such corporations. The statute under consideration is one aimed in that direction, and should not be eviscerated by a narrow construction that would fall short of, or defeat, the object of its enactment.

In using the words "or deposited therein," the legislature must be deemed to have known what kind of deposits usually and ordinarily appertain to the banking business; and there is nothing in the language of the statute that manifests any intention to restrict the meaning of the words last quoted to any particular class or character of such deposits.

There are three classes of deposits recognized by law, and in the banking business—viz., special, specific, and general. *Special*, where the whole contract, express or implied, is that

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the thing deposited shall be safely kept, and that identical thing returned to the depositor. *Specific*, where money is deposited to pay a check drawn, or to be drawn, or for any purpose other than mere safe-keeping, or entry on general account; the title remaining in the depositor until the bank pays the person for whom it is intended, or promises to pay it to him. *General*, all deposits not expressly made special or specific, or unless the circumstances are such as to imply that the deposit is not meant to be general, as where the money is deposited inclosed in a box, or bag, or sealed up. 1 Morse on Banks and Banking, §§ 185, 186. See, also, Code of 1886, § 1525, subd. 7.

Obviously, the purpose of the statute is to extend protection to the bank itself, as well as to its depositors or customers, against the unfaithfulness of its officers, agents and servants; and, to this end, it makes it felony for such officer, agent or servant to embezzle, or fraudulently convert to his own use, any money in the possession of the bank, whether its own or that of a depositor. Money, property or effects *belonging to the bank* may be the subject of embezzlement, or fraudulent conversion, under this statute, without being in the possession of, or having been deposited in the bank, provided the same came lawfully into the hands of the accused by virtue of his office or employment; but not so as to the money, property or effects of others than the bank; these last, in order to be the subject of embezzlement, or fraudulent conversion, under the terms of the statute, must be *in the possession of the bank, or have been deposited therein*. And the statute evidently assumes that, as to these last, an indictment is sufficiently certain which charges that they were deposited in, or in the possession of the bank. In the eye of the statute, it can make no difference whether the money, property or effects come into the possession of the bank by special or general deposit, nor who is the actual owner thereof. Although, in the one case, the title may be in the individual making the special deposit, and in the other in the bank, by reason of the legal relation between bank and customer arising from the general deposit, it is no more the property of the officer, or agent or servant of the bank in the one case than the other; his identity is as separate and distinct from that of the bank as it is from that of any depositor or customer of the bank. It is but a reasonable construction of the statute to hold that an indictment containing the other necessary averments, and which charges that the money, property or effects embezzled were in possession of, or deposited in such bank, sufficiently charges

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the ownership of the property; and this, whether the money, property or effects, were in possession of the bank by general or special deposit.—6 Am. & Eng. Encyc. of Law, 505.

It has been held under general statutes of embezzlement, that it is unnecessary for the indictment to aver ownership of the property as a fact separate and distinct from the necessary inference of such ownership based on the relation of principal and agent, and the fact that the property embezzled came to the servant's possession by virtue of his employment; but, if alleged, it must be proven strictly. *Washington v. The State*, 72 Ala. 272. So, under this statute, if the relation of officer, agent, clerk or servant, towards the bank, be averred, it satisfies the statute; the bank is to be regarded as the owner of the money, property or effects embezzled, whether the same came into its possession by general, or special, or specific deposit. Moreover, the indictment follows the form prescribed by law, and was properly sustained.—Code of 1886, § 489, and Form No. 39; *Huffman v. The State*, 89 Ala. 33; *Lowenthal v. The State*, 32 Ala. 689.

The word "embezzles", used in the statute, is one having a technical meaning, and that meaning suggests the character and scope of the proof required to sustain the charge. It involves two general ingredients, or elements: first, a breach of duty or trust in respect of money, property or effects in the party's possession, belonging to another; secondly, the wrongful or fraudulent appropriation thereof to his own use. There must be the actual and lawful possession or custody of the property of another by virtue of some trust, duty, agency or employment on the part of the accused; and while so lawfully in the possession of such property, it must be unlawfully and fraudulently converted to the use of the person so in the possession and custody thereof; and, in prosecutions under the statute herein referred to, the person charged must be an officer, agent, clerk or servant of a bank incorporated under the laws of this State, and the property must be money, property or effects belonging to, or in the possession of such bank, or deposited therein. Money, property or effects, however, belonging to, or in the possession of such bank, or deposited therein, may at the same time be in the possession of the bank and of such officer, agent, clerk or servant, by virtue of his office, agency or employment; and if they were, previously to their wrongful appropriation, lawfully in the possession and custody of the bank and the defendant as an officer, agent, clerk or servant of the bank, and are, while

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so held by him, fraudulently converted to his own use, this would be embezzlement, or fraudulent conversion, within the terms of the statute. Exclusive possession, therefore, of the money, property or effects by the accused, at the time of their wrongful conversion to his own use, is not necessary in order to constitute the offense created by this statute.

If the money, property or effects of the bank, or, in other words, the business of the bank, of which such money, property or effects constitute a part, are actually or practically intrusted to the care and management of such officer, agent, clerk or servant, to such an extent that by virtue of his office, agency or employment, he has the actual custody or possession of such money, property or effects, or such access thereto as enables him to exercise control over the same, and that would place him in the lawful possession of such money, property or effects, and if while so in the lawful possession of such money, property or effects, as above stated, he fraudulently converts any portion thereof to his own use, he would thereby commit the offense denounced by the statute.

Stating the proposition in another form, it may be said that, if the office, agency, or employment of the accused gives him a joint or concurrent possession and custody of the money, property or effects of the bank with the cashier, teller, or other officer or agent of the bank, and if he, while so in possession, either alone or jointly with such other officers or agents of the bank, fraudulently converts such money, property, or effects, or any part thereof, to his own use, he would be guilty of embezzlement within the meaning of the statute.

In embezzlement, as in most crimes, the essence of the offense, or that which makes it criminal, is the intent with which the act is done. But that intent may be shown, or may be conclusively presumed, from the doing of the wrongful, fraudulent and illegal acts, which, in their necessary results, naturally produce loss or injury to the person, natural or artificial, against whom the offense is committed. "The law presumes that every man intends the legitimate consequence of his acts. Wrongful acts, knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intention to injure or defraud is presumed, when the unlawful act which results in loss or injury is proved to have been knowingly committed. This is the well settled rule which the law ap-

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plies in both civil and criminal cases involving the question of intent."—*United States v. Harper*, 33 Fed. Rep., 471; *United States v. Taitor*, 11 Blatch. C. C. Rep. 394.

Under an indictment based on the statute we are considering, the *gravamen* of the charge is the fraudulent conversion; and in the nature of the case much latitude must be given to the evidence in order to establish the crime. "As a general rule, great latitude is allowed in the range of evidence, when the question of fraud is involved. It is indispensable to truth and justice that it should be so."—*Snodgrass v. Br. Bank of Decatur*, 25 Ala. 175. Fraud is rarely susceptible, in any case, of direct, positive proof, for the reason that its ways are dark and sinuous, and its tracks carefully concealed. In embezzlement generally, and especially in cases such as this now before us, the very confidence and trust reposed furnish the most potent means for its accomplishment and effectual concealment, so that guilt can generally be established only by reasonable inferences drawn from the general course of conduct of such officer, agent, clerk or servant, with respect to the subject-matter of his trust, and from all the facts and circumstances surrounding his acts, which tend to throw light upon or illustrate their nature.—*Ker v. People*, 110 Ill. 627. And upon this principle evidence of other offenses, similar to those charged in the indictment, is admissible. A single act charged in an indictment, standing alone, might be susceptible of inferences of honesty of purpose, or of mere mistake; which, when viewed in the light of a long course of conduct, and of repeated acts of a similar nature intimately and directly connected with the particular accusation, would be utterly inconsistent with such inferences, and the fraudulent intent, with which the particular act was done, demonstrated beyond all reasonable doubt.—*United States v. Lee*, 12 Fed. Rep. 816; *Stanley v. State*, 88 Ala. 154; *Hawes v. State*, 88 Ala. 37; *Ker v. People*, 110 Ill. 627; *Jackson v. State*, 76 Ga. 551; 1 Roscoe's Crim. Ev., top pages 138, 139, 151, 152. "It is hardly ever possible to prove fraud, except by a comprehensive and comparative view of the action of the party to whom the fraud is imputed, and his relative position a reasonable time before, at, and a reasonable time after the time at which the act of fraud is alleged to have been committed."—*Snodgrass v. Br. Bank at Decatur*, *supra*.

The offense denounced in this statute may not only be committed by one of the officers, agents, clerks or servants of the bank, secretly and alone, and without the knowledge

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or co-operation of others engaged in the management of the bank, but it may also be accomplished by collusion of such other officers, agents, clerks or servants, or any of them, with the one accused, whereby he is enabled fraudulently to convert to his own use money, property or effects belonging to, deposited in, or in possession of the bank. Officers of an incorporated bank, and the bank itself, are different and distinct entities. The former are in no sense the owners of the corporate property, entitled to deal with it as their own, or as they may deem proper. They are the mere custodians and managers of the money, property and effects of the corporation, for the purposes prescribed by, or necessarily implied in the law of its being, and are without authority to use, lend, or otherwise deal with the money of the bank, except as authorized by law.—Code 1886, § 1525. Loans may be made contrary to law, and in disregard of the usual and ordinary precautions taken by banks generally, without subjecting the officers by or to whom such loans may be made to the charge of embezzlement, although they may be palpable violations of duty. But we do not question that the statute may be violated by fraudulent transactions under the guise of loans, made with full knowledge of the managing officers or agents of the bank. The distinction is between the making of mere irregular, unsafe, or reckless loans of the bank's money, which would amount to maladministration only, and pretended loans, made in bad faith for personal advantage and with fraudulent intent, the pretended borrower being an officer, agent, clerk or servant, having control and custody of money of the bank by virtue of his office or employment, which control and custody is shared by those making the pretended fraudulent loan, and who participate in the fraudulent purpose of the pretended borrower. And in cases which assume this phase, it may become essential that the evidence should be permitted to take such range as to show the relationship existing between such managing officers, their management of the funds of the bank with respect to each other, the transactions they have had or permitted with each other, involving the use of the bank's money, outside of and beyond the usual course of dealing of the bank, similar to, or connected with, the loan which is brought in question by the indictment. and illustrative of the real purpose and intent with which the latter was made.

A transaction such as is herein above referred to would not be a loan in any sense of the law; it would be a fraud, and such fraud may be accompanied by facts and circumstances.

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stances which would constitute it embezzlement, or a fraudulent conversion to the use of the accused, within the meaning of this statute. "The fraudulent conversion may be consummated in any manner capable of effecting it." 6 Amer. & Eng. Encyc. of Law, pp. 452, 453.

Some of the principles hereinabove declared are suggested, and others fully supported, by the case of *U. S. v. Harper*, 33 Fed. Rep. 471.

We will now take up the facts of the case with the view of considering whether or not, in the light of the principles above declared, the trial court ruled correctly on the numerous exceptions to the testimony. The John McNab Bank was incorporated on the 14th day of April, 1883, under the laws of this State, with an authorized capital of \$100,000.00, its place of business being the city of Eufaula, Alabama. During the year 1890, and up to the failure of the bank in March, 1891, the stockholders and directors of the bank consisted of the defendant, Wm. N. Reeves, his brother, J. H. Reeves, defendant's son, J. M. Reeves, and one Rhodes; of whom the defendant was president of the bank, his brother was vice-president, and Rhodes was cashier. Defendant owned \$49,000 of the capital stock, his brother \$40,000, Rhodes \$6,000, and defendant's son \$5,000.

In the latter part of the year 1889, defendant and his brother, the said J. H. Reeves, engaged in the cultivation of a plantation in Russell county which belonged to their wives, who had acquired the same from their father, John McNab; and defendant's testimony tends to show that he and his brother, with that purpose in view, conferred with Rhodes, a stockholder, director and cashier, and that it was agreed by and between the three, as officers of the bank, that the bank should advance to defendant and his brother money to run the plantation during the year 1890, with the understanding, as defendant testified, that the cotton crops grown on said plantation that year should be applied to the payment of whatever sums might be so advanced by the bank for the use of the said plantation. The plantation was accordingly cultivated and managed that year, as defendant testified, by defendant and his brother, without consulting their wives, and without any rent contracts being made with them.

On the 23d of June, 1890, defendant drew a check on said bank for \$558.34 payable to Exton Tucker, or bearer, the check being signed "Russell Place, R." Other checks for various amounts, and signed in the same manner, were drawn by defendant on said bank, during the months of

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July, September, October and November, 1890. All the checks were paid by the cashier from the general funds of the bank, and were entered on the books of the bank as charges against the "Russell County Place," a regular account with said place being kept on the books of the bank, just as other accounts were kept on its books. The account with said Russell county plantation commenced with the bank in 1886, and was continued regularly on the books of the bank until it made a general assignment, in March, 1891. None of the amounts drawn on said checks were paid to defendant, in person, but to Exton Tucker and others, by whom they were presented; and they purport on their face to have been given by defendant to such persons, for supplies and labor for said Russell county plantation. And defendant testified that these checks were all drawn in the regular course of business, with the knowledge and consent of all the officers of the bank, and that the bank's books were kept in respect thereto by the book-keeper of the bank, in the regular way that other accounts were kept on said books; and that there never was any agreement between defendant and such officers that any of the bank's money should be taken out, except in the regular course of business, and on checks drawn on and payable by said bank.

On January 3d, 1891, defendant and his brother gave the bank a paper drawn by W. N. and J. H. Reeves, on and accepted by W. N. and J. H. Reeves, for \$6,692.08, payable on demand, to the order of C. Rhodes, cashier, at the John McNab Bank, Eufaula, Ala., which paper was so given to balance the account of the Russell county plantation on the books of the bank. This paper was never paid, and it passed to the bank's assignee under the deed of assignment of March, 1891. At the time it was given, W. N. and J. H. Reeves, as a firm and as individuals, were insolvent. When the bank failed and assigned in 1891 it had among its assets claims against various persons aggregating a large sum, a large proportion of which the testimony shows to be worthless, and among which last are the following:

Account on J. H. Reeves.	\$ 4,485 67
Account on W. N. and J. H. Reeves.	6,849 30
" " " " " agents.	4,958 27
" " C. Rhodes.	2,000 00
" " W. N. and J. H. Reeves.	55 00
" " C. Rhodes.	4,000 00
" " C. Rhodes.	47 69
" " W. N. and J. H. Reeves.	5,553 50
" " W. N. and J. H. Reeves.	5,954 55

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Account on W. N. Reeves.....	24,624 92
“ “ W. N. Reeves.....	20,123 90
“ “ J. H. Reeves.....	7,943 65
“ “ J. H. Reeves.....	1,490 50
“ “ C. Rhodes.....	2,000 00
“ “ W. N. and J. H. Reeves....	6,692 08

And in addition to the above, which are shown by the testimony to be worthless, there is another claim against W. N. Reeves, the defendant, for \$7,291.04, which the testimony shows to be worth its face value.

The amounts above shown against the cashier, Rhodes, were drawn by him on his own checks in June and July, 1890, and, according to the State's testimony, the checks were regularly entered on the books of the bank, to which defendant had access; but, according to defendant's own statement, the checks were not entered on the bank's books until the bank had assigned, and defendant disclaimed all knowledge of said checks until after the assignment. Defendant's own statement further showed that the amounts charged against him individually are against him and his brother jointly, were the accumulation of all his indebtedness to the bank since its organization, and that said sums were closed up on the books of the bank just before the suspension of the bank, and in order "to get the accounts of defendant and said firm closed up on the books."

The bank owed, at the time of its failure and assignment, \$100,000, or more, to its depositors, and an additional \$100,000, or more, to other creditors; and its assets were of comparatively little value. The bills receivable of the bank, including the claims just mentioned, amounted to \$233,010.94. The "bills receivable book" of the bank had not been in possession of the bank since January 15, 1888; but a "bills receivable book" was made up by the book-keeper to March 30th, 1891, the date of the assignment, the entries on that book being brought forward from the old book by the book-keeper, who knew nothing about the items so brought forward.

The trial balance book of the bank, made up by the book-keeper, showed a surplus of \$20,000.00 on March 31, 1891, and also showed, among other things, that drafts of W. N. and J. H. Reeves to the amount of \$75,000, discounted by the John McNab Bank, had been re-discounted by that bank with banks in New York, on collaterals furnished by defendant and his said brother; and it was shown that said collaterals were insufficient to pay the drafts they were given to secure.

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There was also testimony to show that the wives of defendant and his brother J. H. Reeves were each solvent, and owned considerable property in their own right; and defendant's proof tended to show that the property owned by his wife was acquired by her otherwise than from him. The remainder of the testimony it is unnecessary to notice.

The exceptions reserved by defendant to the rulings of the court on the testimony arise, in the first place, on the introduction in evidence of the several checks drawn by defendant on the bank on account of the Russell county plantation, other than the check for \$558.34, which is the basis of the charge in the second count of the indictment, and as to which no objection was made. These objections were made both before and after the election of the State to proceed only on the second count of the indictment. The rulings of the court on these objections, both before and after the State's election, were in accord with the principles herein above laid down, and defendant's exceptions thereto were not well taken.

The objections of defendant to the testimony showing that the checks given by him for supplies and labor for the Russell county plantation were regularly entered on the books of the bank, which objections were made both before and after the State elected to proceed on the second count alone, were not well taken. It does not appear, either from the record, or from the briefs of counsel, why this testimony was offered by the State, or objected to by defendant. Naturally, its tendency would be to rebut the inference of fraud, by showing an absence of that concealment which usually attends fraud. False entries made in the books, if any, touching the transactions connected with the checks, made either by the defendant himself, or under his direction, would go far to give color to such transactions, and to fix their character as fraudulent; but the correctness or regularity of the entries as to said checks, in the books offered in evidence, does not appear to be challenged. Of course, there may be cases where all the officers or managers of a bank are so related, or mutually and collusively engaged in a scheme to unlawfully appropriate the funds of the bank to their own individual or joint use, as that it may be a matter of indifference whether the usual and regular entries are made or not, there being no risk or peril to accrue from a knowledge of such entries by any of such officers or managers; or such entries may be regularly kept up with the purpose of covering up the real nature of the transactions, by an appearance of fairness and regularity;

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or there may even be over particularity in this respect, amounting to a badge of fraud in itself. But, whether that is the case here or not, the book entries as to said checks were so related to and connected with the main transaction as to constitute part thereof, and were proper evidence under the principles and authorities herein set forth.

The several objections to each of the checks, on the ground that they were paid to Tucker for plantation supplies, can not be sustained. There was no difference, in law, between the payment of the checks to defendant in person, and the payment of them to another by his direction, or at his instance; and although it appeared from the face of such checks that they were given for supplies for a plantation confessedly controlled and cultivated by defendant in part, it was, nevertheless, open to the consideration of the jury whether they were in fact given for such purpose, or whether in the light of all the testimony they were given for another and wrongful purpose sought to be hidden by the form in which such checks were drawn and paid. *United States v. Fish*, 24 Fed. Rep. 585; *U. S. v. Harper*, 33 Fed Rep. 484, 485.

After it was shown in evidence that all the checks drawn by defendant for said plantation, including the check mentioned in the second count of the indictment, were paid from the general funds of the bank, defendant objected thereto on that ground, and moved to exclude the same from the jury. Under the construction of the statute adopted by us in this case, the general funds of the bank constituted money "in the possession of such bank, or deposited therein," within the terms of the statute and the indictment. The objection, therefore, was not well taken, and there was no error in the action of the court in overruling it.

The several objections to the testimony showing that defendant, on the 3d day of January, 1891, gave the joint paper of his brother and himself for \$6,692.08 to close up or balance the Russell county plantation account on the books of the bank for 1890, and to the evidence showing that this paper was never paid, and to the evidence that defendant and his brother were insolvent, have no merit. These were facts cognate to the main fact, and bearing on the question of intent; the proof, therefore, was properly admitted.

The objection to the evidence showing that the Russell county plantation belonged to the wife of defendant and his brother's wife jointly, was properly admitted; but whatever

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force there may have been in the objection to this testimony when it was offered, the objection was cured by the subsequent testimony of the defendant himself, that he was personally interested in the control and management of the plantation.

There was objection by defendant to the testimony offered by the State showing the deed of assignment made by the bank in March, 1891, and showing by the trial balance of March, 1891, the condition of the assets and liabilities of the bank at the time of the assignment; that the bills receivable book had not been in possession of the bank since the year 1887, and that a fruitless search was made for it after the assignment; that a large part of the entries of the old book were brought forward into the new book by the book-keeper, who knew nothing of the several items so brought forward; that said book on March 15, 1891, showed bills receivable to the amount of \$233,010.94; that certain claims against defendant individually, and jointly with his brother, and also against Rhodes, the cashier, were included in said amount; that the bank re-discounted with New York banks \$75,000.00 of paper made by defendant and his brother on collaterals furnished by the McNab Bank and the defendant, and which were insufficient to pay the paper; that the trial balance book showed a surplus of \$20,000 on March 30th, 1891; that the bank at the time of its assignment owed its depositors more than \$100,000, and to other creditors an additional \$100,000, or more, and showing its assets at the time of its suspension; that Rhodes, the cashier, drew out of the bank six or eight thousand dollars, in different amounts, and that defendant's said brother was likewise largely indebted to the bank, and that he was insolvent; that defendant, his brother, his son and Rhodes were the stockholders of the bank, and the amount of stock owned by each; that the checks offered in evidence were all the checks found after the assignment in the case kept by the bank for cancelled checks; that the Russell county plantation had a credit in 1887 of \$2,345.00; and the testimony that defendant's wife was solvent when the draft for \$7,480.00 was discounted for the Russell county place. All this testimony was within the legitimate range of proof in this case, and from which, in connection with the other proof, it was for the jury to consider whether there was a scheme to get the money of the bank, which defendant is charged in the indictment with having embezzled, into defendant's possession, by fraud and for his own use. It is true the defendant is not indicted for wrecking the

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bank, nor for making false entries in the books, nor for conspiring with the other officers of the bank to misapply its funds, nor is he punishable, under this indictment, for the several acts of his brother and Rhodes in appropriating the money of the bank to their own use; but the above mentioned facts, in connection with the other proof, all show a long course of unlawful dealing in the affairs and management of the bank, of which defendant, as its president, could not have been ignorant, and which could not have occurred without his participation, and which may shed light on the motives and intent influencing him in the admitted appropriation to his own use of the money shown to have been drawn out by him on said checks, including the one on which the indictment is based.—Whar. Crim. Ev. §§ 38, 46; 6 Amer. & Eng. Ency. of Law, 501, 503.

The tendency of the evidence is to show that defendant, when the failure of the bank occurred, and the assignment was executed, had withdrawn the funds of the bank on his individual account to about, or more than, the amount of his subscription to the capital stock of the bank; that Rhodes, the cashier, had done the same; and that W. N. Reeves, while drawing out proportionally less than the others, had obtained about \$10,000 on his individual account, and over \$18,000 jointly with his brother, and, so far as the testimony shows to the contrary, these large sums were obtained by these managing officers of the bank without any security. Furthermore, there is nothing in the testimony, or of which the court can take judicial notice, showing any unusual disaster or convulsion in the banking or general business of the country. Yet there is no explanation in the testimony of the cause or causes which produced the failure and consequent assignment of this bank.

These facts can not be disregarded in determining the question of defendant's guilt or innocence, but must be considered in their relation to all the other testimony in the case; and the question for the jury is, whether upon all the facts the defendant, while he was an officer, agent, clerk or servant of the bank, fraudulently converted to his own use, under the form or guise of loans, or by any means, or in any manner shown by the testimony, the money, property or effects belonging to the bank, or in possession of the bank, or deposited therein, charged in the indictment to have been embezzled by him, or converted to his own use. Embezzlement is an offense that may be consummated in any manner capable of effecting it, but it must distinctly appear that the

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defendant acted with an unlawful intent indicating a design to defraud the bank.—6 Am. & Eng. Encyc. of Law, pp. 452, 453, 455.

Testimony was offered by the State, and objected to by defendant, to show that the wives of defendant and his brother, J. H. Reeves, were worth from twenty-five thousand to thirty thousand dollars each, during the year 1890. It was competent testimony, not as raising any inference that their property had been acquired wrongfully through the connection of their husbands with the bank, but as bearing upon the *bona fides* of defendant in drawing money from the bank for the ostensible purpose of running the plantation, when his wife had in her own right the necessary means therefor.

The testimony offered by the State, and objected to by defendant, showing that the Russell county plantation was worth from \$6,000 to \$9,000, and the stock and farming implements thereon were worth \$1,000, was competent to be considered by the jury in connection with the further testimony that the amount drawn by defendant from the bank, ostensibly for supplies and labor for said place during the year 1890, amounted to \$6,692.08, according to the paper of his brother and himself given to balance the account for that year, and amounting to over nine thousand dollars, if there is included the \$2,345 to the credit of that account in 1887. From these facts, it was permissible for the jury to draw inferences as to the *bona fides* of defendant in drawing from the bank, for the ostensible purpose of paying for labor and supplies for making one year's crop on said place, a sum of money almost, if not quite, equal to the value of the plantation itself, and accordingly to determine from these facts, and all the other proof, whether the manner of obtaining the money, and the professed purpose for which it was obtained, were not a cloak or cover to some ulterior and wrongful purpose.

The testimony offered by the State, and objected to by the defendant, showing how the door of the bank building was arranged with reference to defendant's office, and the door from defendant's office into the office of the bank's attorney, and the condition of such doors ten or eleven days after the bank assigned and the assignee had taken charge, is stated with such vagueness and obscurity in the record that it does not appear what the testimony on that subject was. We can not see that the defendant was not injured by its introduction; on the contrary, its natural effect, probably, was to prejudice his case before the jury. It was irrelevant.

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vant and incompetent testimony, and should have been excluded.

The testimony offered by the State, and objected to by defendant, that the defendant's brother had a private box in the bank building but not in the vault, and that said box contained no assets of the bank, and that defendant's brother removed said box from the building on the night of March 30th, 1891, without defendant's knowledge or consent, was not relevant to any issue in this case. There is nothing in the testimony to show what the box in fact contained, or that defendant had access to it while it was kept in the bank, or that it had any connection with, or relation to defendant's transactions with the bank; and the statement that it was removed by defendant's brother on the night before the assignment, without defendant's knowledge, relieves the latter from any unfavorable inference to be drawn from his brother's act. This testimony should have been excluded.

We have now considered all the objections arising on the testimony, and it remains to take up the several charges requested by defendant and refused by the court.

The charges numbered first, second, third, fourth, and eleventh, in the form which they were requested by defendant, confine and limit the question of fraudulent intent to the time of the receipt by the defendant of the money of the bank which he is charged with having embezzled. The fraudulent intent, which is a necessary ingredient of every offense of embezzlement, is the fraudulent intent with which the money or property *is appropriated to the use of* the party charged. In this case, if there was any embezzlement, or fraudulent conversion of the bank's money by the defendant, it must necessarily have been in and upon the receipt of the money drawn on defendant's check, so that here the receipt of the money and the appropriation of the money were one and the same act. As applied to the testimony in this case, therefore, these charges are not open to the objection that they limit the inquiry as to defendant's intent to the time of the receipt by him of the money he is charged with having embezzled. Nor are the first, second and third charges vicious in any other respect. They should have been given as requested, and their refusal was error.

The effect of the fourth charge, had it been given, would have been to unduly emphasize the testimony in the case exculpating in its nature, to the practical exclusion from the consideration of the jury of the testimony which is incriminating in its tendency. This charge, furthermore, invades the province of the jury. There is no absolute duty imposed

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by law on the jury to believe that phase of the evidence most favorable to the defendant rather than that the tendency of which is to show his guilt. It is for the jury to determine from all the evidence whether they are satisfied beyond a reasonable doubt of the defendant's guilt, "and what conviction such evidence shall produce on their minds, or which theory will they accept."—*Fonville v. State*, 91 Ala. 39; *Mitchell v. State*, 94 Ala. 68; *Skipper v. Reeves*, 93 Ala. 332. This charge was properly refused.

The fifth and thirteenth charges asked by defendant are faulty in that they altogether ignore the *bona fides* with which the money may have been loaned by the officers of the bank to the defendant, notwithstanding the loan may have been made by them "in the usual way and manner of doing business by said bank," and was known to the ministerial officers of the bank. They withdraw from the consideration of the jury the question whether the defendant and the other officers of the bank resorted to the ordinary and usual form of a loan in order to cloak or cover up a fraudulent purpose to enable defendant to appropriate the money of the bank to his own use. They also ignore entirely the question of defendant's intent in obtaining the money. There was no error in the refusal of the court to give these two charges.

The sixth charge asked by the defendant was properly refused by the court. It postulates the right of defendant to an acquittal upon the fact that, at the time of discounting said draft, he had "no intent to embezzle the same, or fraudulently convert it to his own use," while the fact is, the defendant is not charged in the indictment with the embezzlement or fraudulent conversion of said draft. If the funds of the bank were procured by the discount of said draft, the embezzlement would have been of the funds, and not of the draft which defendant himself drew.—*Jackson v. The State*, 76 Ga. 551. The charge is, also, open to the objection, that it limits the inquiry as to defendant's intent to the time when the draft for \$7,480 was discounted, to-wit, June 26th, 1890, whereas the evidence shows that the money defendant is charged with having embezzled was obtained by him before said draft was discounted, to-wit, on the 23d day of June, 1890. Other objections to this charge might be shown, but it is unnecessary to consider it further.

The seventh and eighth charges assert incorrect propositions of law, and their refusal was not error. They ignore entirely defendant's intent in obtaining the loan, and rest his right to an acquittal on the good faith of the officers of the bank in asking the loan. They also withdraw from the

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consideration of the jury much of the material testimony in the case.

There was no error in the refusal of the court to give the ninth and tenth charges asked by defendant. The principles they assert are not in harmony with the construction we have placed on the statute.

The bill of exceptions states that the court consented to give the twelfth charge asked by defendant, and wrote on it the words, "Given, Carmichael, Judge;" and then by mistake the judge handed it to the clerk, with a bundle of refused charges, and, consequently, it was not read to, or considered by the jury. The bill of exceptions recites: "But the court gave substantially the same charge generally, and specifically at the request of the defendant." The charge, as requested, was erroneous, and defendant can not complain that an erroneous charge, although in fact marked given and intended to be given by the court, was not submitted to the consideration of the jury. The charge involves the assertion that, if the defendant obtained the money of the bank with the knowledge and consent of its managers, he would not be guilty, although at the time of so obtaining the money he may have had no intention of repaying it to the bank. It does not assert a correct proposition of law, and, moreover, its tendency was to mislead the jury.

The general charge for defendant was properly refused.

The ruling of the Circuit Court on defendant's motion for a new trial is not revisable in this court. The act of February 16, 1891 (Acts 1890-91), is limited by its terms to civil cases.—*Walker v. The State*, 91 Ala. 76; *Jolly v. State*, 94 Ala. 19.

For the errors pointed out above, the judgment of the court below is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

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Bill in Equity by Judgment Creditor, to subject Property Fraudulently Conveyed by Debtor.

1. *Conveyance by insolvent or embarrassed debtor; when set aside at instance of creditor.*—A conveyance of his property by an insolvent or embarrassed debtor, though executed with the fraudulent intent on

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his part to put his property beyond the reach of his creditors, will not be set aside in equity at their instance, unless the purchaser participated in the fraudulent purpose, or had knowledge or notice thereof, actual or constructive; and when answer on oath is required of him, and he answers fully and explicitly, denying all knowledge or notice as charged, his denials must prevail, unless the testimony adduced is sufficient to overcome them.

2. *Inconsistent prayers for relief; relief under general prayer.*—If a creditor, filing a bill to set aside an alleged fraudulent conveyance by his debtor, and to subject the property conveyed to the payment of his debt, may also ask, in the alternative, to hold the purchaser liable for a balance of purchase-money paid after bill filed and process served (which is not decided), he can not have that relief under the general prayer.

APPEAL from the Chancery Court of Wilcox.

Heard before the Hon. THOS. W. COLEMAN.

The bill in this case was filed on the 2d July, 1887, by Thomas H. Pattison, as a judgment creditor of Thomas Bragg, against said Thomas Bragg, Willis Bragg, Robert J. Carson, and others; and sought to set aside a conveyance of his property executed by said Thomas Bragg to Willis Bragg, who was his younger brother, and to said Carson, who was his cousin, and to subject the property to the satisfaction of the complainant's debt, which was evidenced by two judgments recovered against him as surety for said Thomas Bragg, and which he had paid, taking an assignment of them to himself, and having an execution afterwards returned "No property found." One of said judgments was rendered on the 26th May, and the other on the 2d June, 1887; but, in each case, the action was commenced in November, 1886, and the judgment was by default. The deed assailed for fraud was dated May 16th, 1887, and recited the payment of \$2,750 as its consideration; the property conveyed consisting of one lot or more in the town of Camden, on which there was a livery-stable, and a tract of land containing about 250 acres, adjoining the corporate limits of said town, on which there was a growing crop of corn and cotton; but this property was incumbered with two mortgages, which were recognized and mentioned in the conveyance to said Willis Bragg and Carson. On the same day this conveyance was executed, Thomas Bragg sold to said Willis Bragg and R. J. Carson the horses and mules on the land, the farming implements, and all of his other personal property not exempt from levy and sale under legal process; and the bill assailed the validity of this sale, as being part of one and the same transaction. The bill alleged that, at the time the conveyance was executed and the sale made, Thomas Bragg was financially embarrassed,

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if not insolvent; that the conveyance included all of his property which was subject to levy and sale under execution; that the property conveyed was worth at least \$5,000; that the conveyance was executed by the grantor with the fraudulent purpose of putting his property beyond the reach of his creditors, in view of the suits then pending against him, in which the judgments paid by complainant were rendered; that the purchasers had knowledge or notice of said debtor's financial condition, and participated in his fraudulent intent; and that the recited consideration was fictitious in whole or in part. Answers on oath were required, and specific interrogatories annexed to the bill as to all the details of transactions between the parties.

An answer on oath was filed by Willis Bragg, containing full answers to each of the interrogatories; and an answer was also made by said Carson, which was duly sworn to, but he died before it was filed, and it was afterwards filed by his widow and administratrix, against whom the cause was revived, as a part of her answer. Each of these answers denied, fully and explicitly, any knowledge on the part of the respondents of said Thomas Bragg's alleged fraudulent purpose, and any knowledge or notice of his indebtedness beyond the two mortgage debts; alleged that the real value of the property was, as estimated in the contract, about \$3,400, of which sum \$390 was paid in cash, a draft for \$1,636 given on one Nunnalee, a banker who lived in Texas, who was an uncle of the parties, and who had promised to lend them \$2,000 to complete the purchase, and the balance was the aggregate of the two mortgage debts; and made other specific statements and denials in detail.

On final hearing, on pleadings and proof, the Chancellor refused to set aside the conveyance, holding that the evidence was not sufficient to overcome the denials of the sworn answers; and he further held that no relief could be granted as to the \$1,636 paid on the draft after the filing of the bill, since that relief would be inconsistent with the prayer of the bill. The complainant appeals, and assigns the decree as error.

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J. N. MILLER, and B. HOWARD, for appellant.—(1.) The fraudulent intent of Thomas Bragg, the debtor and grantor, is not controverted; and the only question is, whether the grantees participated in that fraudulent intent, or had knowledge or notice thereof. The appellant relies, in this connection, on the relationship between the parties, their

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intimate association, and the particular circumstances attending and following the transaction, as developed by the evidence—the hurried visit of the debtor to Texas, his quick return, followed by his kinsmen, the haste with which the trade was consummated, the entire change it worked in the business of the several parties, and the uncertainty in the proof as to the consideration.—*Crawford v. Kirksey*, 55 Ala. 282; *Lehman v. Kelly*, 68 Ala. 192; *Hodges v. Coleman*, 76 Ala. 173; Bump Fraud. Conveyances, 3d ed., 55. (2.) The purchasers, if entitled to protection at all, can only claim reimbursement of the \$390 paid in cash; the draft for \$1,636 not being paid until the lapse of several months after the service of process in this case.—*Bush v. Collins*, 35 Kansas, 535; *Ware v. Curry*, 67 Ala. 274; *Sewing-Machine Co. v. Zeigler*, 58 Ala. 221; Wait's Fraud. Conveyances, § 369. That the draft was revocable, until accepted or paid, see 27 Ala. 399; 77 Ala. 168, 330. Relief to the extent of this \$1,636 is not inconsistent with the special prayer of the bill, and may be granted under the general prayer—it varies only the degree and measure of relief.—*Morrow v. Turney*, 35 Ala. 131–39.

R. GAILLARD, and S. J. CUMMING, *contra*.—(1.) The answers are under oath, as required by the bill, and contain very full and particular denials of the charges of fraud and notice; and these denials must prevail, unless overcome by the positive testimony of two witnesses, or of one witness with strong corroborating circumstances.—Cases cited in 1 Brick. Digest, 738, § 1466; 53 Ala. 197; 67 Ala. 529; 66 Ala. 517; 52 Ala. 554. (2.) The fraudulent intent of the grantor does not affect the purchasers, unless it is shown that they participated in it, or had knowledge of facts charging them with notice.—*Crawford v. Kirksey*, 55 Ala. 282; *Pickett v. Pipkin*, 64 Ala. 520; *Bradley v. Ragsdale*, 64 Ala. 558; *Hodges v. Coleman*, 76 Ala. 103; *Shealy v. Edwards*, 76 Ala. 176; *Marshall v. Croom*, 52 Ala. 554; *Borland v. Mayo*, 8 Ala. 104. The pendency of a suit is not constructive notice of indebtedness to persons who are not parties to it.—Bump Fraud. Con., 38. Fraud is not to be presumed, when the facts may reasonably consist with honest intention.—*Thames v. Rembert*, 63 Ala. 561; *Bailey v. Litten*, 52 Ala. 282; *Harrell v. Mitchell*, 61 Ala. 271. The adequacy of the consideration paid being fully established, the fact of relationship does not establish the charge of fraud, and is not even a badge of fraud.—*Marshall v. Croom*, 52 Ala. 554; *Hubbard v. Allen*, 59 Ala. 283; *Barnard v. Davis*, 54 Ala. 565. (3.) The bill

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sought to set aside the sale and conveyance on the ground of fraud, in which the purchasers were said to have participated. If the complainant had established his case, the purchasers could not have claimed to be reimbursed to the extent of the \$390 paid in cash; nor can the complainant, even by an amended bill, claim relief to the extent of the draft for \$1,636.—*Gordon v. Tweedy*, 71 Ala. 202; *Potter v. Gracie*, 58 Ala. 303; *Caldwell v. King*, 76 Ala. 129.

STONE, C. J.—We have examined the pleadings and testimony in this case with great care. We agree with the chancellor in finding that Thomas Bragg's intent in selling and conveying his property to Willis Bragg, his brother, and to Carson, his cousin, was fraudulent; and if he alone were concerned, we would not hesitate to declare the property subject to Pattison's claim.—*Borland v. Mayo*, 8 Ala. 104; *Marshall v. Croom*, 52 Ala. 554; *Crawford v. Kirksey*, 55 Ala. 282; *Hubbard v. Allen*, 59 Ala. 283; *Donegan v. Davis*, 66 Ala. 362; *Lehman v. Kelly*, 68 Ala. 192; *Hodges v. Coleman*, 76 Ala. 103. But the complainant in his bill called for a sworn discovery from the purchasers, and propounded to them searching interrogatories. Their answers are a very full denial of all knowledge on their part of Thomas Bragg's fraudulent purpose, and of his indebtedness beyond what he provided for in his sale to them. They equally denied all participation in any and all fraudulent intent on the part of Thomas Bragg, if he entertained such intent. The testimony fails to overcome these denials, and it results that in this phase of the case complainant must fail.

It is contended here that, if complainant fails in this leading aspect of his case, then he is entitled to recover the amount of his claim out of the sixteen hundred dollars of purchase-money, which Willis Bragg and Carson owed when this bill was filed and process served on them. A sufficient answer to this contention is, that the bill contains neither averment nor prayer which could raise that issue, even if it be conceded such purpose could be conjoined with the main object of the bill.—*Caldwell v. King*, 76 Ala. 149; *Coffey v. Norwood*, 81 Ala. 512; *Parsons v. Johnson*, 84 Ala. 254; *Shealy v. Edwards*, 78 Ala. 176.

The decree of the chancellor is in all respects affirmed.

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1. *Claim of exemption to property levied on; waiver of accompanying inventory.*—When a claim of exemption is interposed to personal property on which an attachment has been levied, it should be accompanied with a statement of all the defendant's other personal property, *choses* in action, &c. (Code, §§ 2521, 2525); but the want of such statement is waived, if the plaintiff, without objecting to the sufficiency of the claim, makes a written demand for an inventory.

2. *Issue contesting claim of exemption; error without injury.*—On a contest of a claim of exemption to personalty, an issue being formed under the direction of the court, in which the plaintiffs allege that the property levied on is subject to their attachment, and is not by law exempted to the defendant, this properly presents the question to be tried, namely, whether the defendant has property, money or effects not included in his inventory; and if there is error in the refusal of the court to require the defendant to join in other special issues tendered by plaintiffs, it is error without injury.

3. *Evidence on issue as to ownership of money.*—On the trial of an issue contesting a debtor's claim of exemption to property on which an attachment has been levied, plaintiffs having proved that he received a considerable sum of money for goods sold a few days before the levy of the attachment, it is permissible for him to show that, when the written demand for an inventory was made on him, he had already used the money in the payment of other *bona fide* debts.

4. *Disposition of property by defendant in attachment claiming exemption.*—When a defendant in attachment claims as exempt the specific property levied on, and his claim is contested by the attaching creditor, he is not thereby deprived of the right to prefer other *bona fide* creditors, and to pay their debts with any other property; but a gift, or fraudulent disposition of his property, is void as against plaintiffs and other existing creditors.

5. *Deposit of money with third person, for creditor.*—If a debtor deposits money with a third person, instructing him to pay it to another, no present consideration passing, the ownership of the money remains in the debtor himself until the beneficiary ratifies the act by accepting the money, or otherwise placing the depositary in a position which might result in prejudice to him by a revocation of the act; and a ratification in such case relates back to the date of the deposit, changing the ownership from that time.

6. *Same; garnishment against depositary; ownership of money deposited.* The ownership of the money so deposited remaining in the debtor, it is subject to garnishment in the hands of the depositary; and if the debtor files an inventory of his property, on a contest of his claim of other property as exempt, while the money is yet in the hands of the depositary, it may be that he should include it, stating the facts; but, if the money has been paid over to the creditor before demand for an inventory is made, the attaching creditor can not complain, nor insist that it be estimated as a part of the debtor's property.

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APPEAL from the Circuit Court of Perry.
Tried before the Hon. JOHN MOORE.

G. B. JOHNSTON, and J. H. STEWART, for appellants, cited *Coleman & Carroll v. Hatcher*, 77 Ala. 217; *Clark, Austin & Smith v. Cilley*, 36 Ala. 652; *Brooks v. Hildreth*, 22 Ala. 469; *Sterrett v. Miles*, 87 Ala. 472; *Wood v. McCain*, 7 Ala. 800; *Williams v. Jones*, 77 Ala. 294; 5 Amer. St. 391; 2 Greenl. Ev., § 119; *Drake on Attachment*, § 525; *McCrary v. Chase*, 71 Ala. 540; *Donaldson v. Waters*, 30 Ala. 175; *Hill v. Hill*, 10 Ala. 527.

PITTS & HARWOOD, *contra*, cited *Governor v. Campbell*, 17 Ala. 574; *Wagner v. Simmons*, 61 Ala. 146; *Reynolds v. Inghard*, 11 Ala. 531; *Chapman v. Lee*, 47 Ala. 150; 1 Amer. & Eng. Encyc. Law, 429; *Blevins v. Pope*, 7 Ala. 371; *Drake on Attachments*, § 221; *Wade on Attachments*, § 29.

CLOPTON, J.—An attachment sued out by the appellants against the appellee, January 1, 1890, was levied the next day on certain personal property. On the same day, appellee filed with the officer levying the process a verified claim to the property as exempt under section 2521 of the Code. Notice thereof having been given to the plaintiffs, they instituted a contest of the claim, in the mode prescribed by the statute. It may be conceded that the claim of exemption filed with the officer, not having been accompanied by a statement of personal property, *choses* in action and money, as required by section 2521, was insufficient. Instead of objecting thereto on this ground, plaintiffs made a written demand upon defendant, August 16, 1890, to file in the Circuit Court a full and complete inventory of all his personal property, except such as is specially exempt from levy and sale, all moneys, debts and *choses* in action belonging to him, or in which he is beneficially interested. By the written demand under section 2525, the plaintiffs waived the objection to the sufficiency of the claim of exemption. *Tinsmere v. Buckland*, 88 Ala. 312.

Defendant having filed an inventory in answer to the demand, an issue was formed under the direction of the court, the plaintiffs alleging that the property levied on "is subject to the plaintiffs' attachment in this case, and is not exempted by law to the defendant." The real issue in such contest is, whether the claimant had other personal property, or *choses* in action or money, not embraced in the inventory. But it is unnecessary to consider the propriety of the ruling of the

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court refusing to require defendant to join in the special issues tendered by plaintiffs. Under the general issue as formed, they were allowed and had the full benefit which they could have derived from the special issues; and the refusal, if erroneous, is error without injury.

Plaintiffs having introduced evidence showing that defendant, shortly before the issue of the attachment, received money for goods sold, and had a considerable sum in his possession, it was competent for him to show that he had appropriated the money to the payment of debts justly due by him. The evidence was relevant to the issue, whether the money belonged to him, or was in his possession, when the written demand for an inventory was made.

It is shown that on January 1, 1890, the same day on which the attachment was issued, defendant handed to his clerk, who is his brother, a sum of money—\$950—which he directed him to pay to his mother and brother on account of debts which he owed them respectively, and get their receipts for the same. The clerk was not the agent of the mother or brother to collect the money, and did not pay it to either of them until the latter part of January, when he went to Meridian and Vicksburg, where they respectively resided. The justness of the debts is not controverted. The court substantially charged the jury, if defendant was justly indebted to his mother and brother in the sums stated, and paid the money to his clerk, in good faith, before the levy of the attachment, for the purpose of paying the debts, and the clerk paid the same to the mother and brother after the levy of the attachment, and the same was received by them in payment of their respective debts, this was a ratification of the payment of the money to the clerk, and the jury must find for the defendant. Charges were asked by plaintiffs asserting the contrary proposition, which were refused.

Plaintiffs contend, that merely placing the money in the hands of the clerk, with a request that he pay it to specified creditors, did not, *ipso facto*, change the ownership; that the request was revocable, at the option of the defendant, until the money was paid to the creditors, or they ratified the payment to the clerk; and they could not ratify the payment after the issue and levy of the attachment, so as to cut off the right of plaintiffs to subject it to their demand; hence, that the money not having been paid to the creditors, and there being no ratification until after the levy and issue of the attachment, the money must be estimated in ascertaining the amount of the exemption to which defendant is enti-

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tled, and be deducted from his claim of exemptions, as provided by section 2531.

The well settled rule is, that when one person delivers money to another, accompanied by a mere request, without any present valuable consideration, to pay it to a third person, such request does not, of itself, change the ownership of the money.—*Coleman v. Hatcher*, 77 Ala. 217. But, if the money is subsequently paid to such third person, and he receives it in payment of his debt, this is a ratification of the unauthorized act, which operates, by relation, to change the ownership of the money as of the time of its delivery to the receiver.—*Brooks v. Hildreth*, 22 Ala. 469. Until such payment or ratification, or until the depositary has entered into some arrangement with the creditor, by which he is brought under obligation to hold the money for him, and by which he would be prejudiced by a revocation of the original direction, the money is subject to garnishment in his hands.

The mere selection and claim of certain property as exempt, though levied on by attachment or execution, does not deprive the defendant of the right to prefer creditors, and apply any property he may own, not levied on, to the payment of their just debts.—*Weiss v. Levy*, 69 Ala. 209. If he has other property or money which may be subjected to his debts, it is incumbent on the attaching or execution creditor to reach and subject it by legal process. Plaintiffs had the right to garnishee the clerk, and thereby intercept the payment of the money to the mother and brother; but failing to do so, they acquired no lien on the money, and its application to the uses originally intended—the payment of their debts—offended no rights of plaintiffs; no rights of theirs intervened, so as to prevent a ratification from having the same force and effect as previous authority to collect the money. Of course, this rule has no application, if the defendant thereby attempted a fraudulent disposition of the money as against his existing creditors. It may be that, had the defendant filed an inventory when he filed his claim of exemption with the officer, such inventory should have embraced the money in the hands of the clerk, which had not then been paid to the creditors, stating the facts. It had, however, been paid over when the written demand was made for an inventory. In such case, the issue is not, whether the money belonged to defendant at the time he filed his claim of exemption, but whether it belonged to him when the written demand to file an inventory in the Circuit

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Court was made under section 2525. The money having been paid to the mother and brother, and received by them in payment of their debts, before the written demand, can not be estimated, if their debts be just, in ascertaining the amount of the exemption to which defendant is entitled, nor deducted from his claim of exemption.

But there is evidence tending to show that defendant stated to witness, the day before the attachment was issued, that he had between three and four hundred dollars worth of accounts, which he intended to give his niece. These accounts, if he in fact had them at that time, and had made no proper disposition of them, should have been included in his inventory; a gift of them to his niece would have been fraudulent as against the plaintiffs. The charge under consideration instructs the jury that on the hypothesized facts therein stated *they must find for the defendant*. This conclusion excluded from the consideration of the jury whether the defendant had accounts which he should have included, but had failed to embrace in his inventory, though he may in fact have given them to his niece after filing his claim of exemption. For this reason the charge is erroneous.

Reversed and remanded.

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Irwin v. Everson.

Bill in Equity for Settlement of Partnership Accounts.

1. *Receiver between partners.*—In a suit for the settlement of partnership accounts, a receiver will not be appointed at the instance of complainant, when the defendant, who has possession of all the property alleged to belong to the partnership, denies the existence of any partnership, and is entirely solvent and able to respond in damages.

APPEAL from the Chancery Court of Elmore.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed on the 15th of December, 1890, by George E. Everson against Robert L. Irwin, and prayed the dissolution of an alleged partnership between the parties, a settlement of the partnership accounts, and the appointment of a receiver to take custody of all the partnership property and effects. The chancellor appointed

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a receiver after answer filed, in which the defendant denied the existence of any partnership between him and the complainant; and this decretal order is here assigned as error.

H. C. BULLOCK, and J. T. HOLTZCLAW, for appellant, cited High on Receivers, §§ 476-78; *Bard v. Bingham*, 54 Ala. 463; *Briarfield Iron Works v. Foster*, 55 Ala. 636; *Randle v. Carter*, 62 Ala. 96; *Hughes v. Hatchett*, 55 Ala. 631; *Scott v. Ware*, 65 Ala. 174.

WM. S. THORINGTON, and JNO. M. CHILTON, *contra*, cited High on Receivers, 2d ed, § 479; 2 Lindley on Partnership, 551; 1 Bates on Partnership, § 86; *Hottenstein v. Conrad*, 9 Kans. 440.

McCLELLAN, J.—This appeal is prosecuted from an interlocutory order appointing a receiver of the partnership alleged to exist between Everson, the complainant, and the defendant Irwin. The fact of partnership, alleged in the bill, is denied by the answer; and on the application of complainant for the appointment of a receiver affidavits were submitted on both sides of the issue thus made. Moreover, it is manifest, indeed is admitted, that the contemplated copartnership was never consummated as to that part of its subject-matter which consisted of realty, for the want of articles in writing signed by the parties; and it may be that the alleged contract, even conceding one to have been entered into by parol, will have to be taken as an entirety in such sort that it can not be upheld as to the personalty and avoided as to the realty. It is not necessary for us, however, to decide either the issue of fact as to the existence of any contract or copartnership, or the question of law as to the effect of the failure of the alleged arrangement as to the land upon that part of the transaction which related to personal property. Not only so, but we apprehend that it would be affirmatively improper to decide at this stage of the litigation, and upon the *ex-parte* showings found in this record, whether or not any partnership has ever existed between the parties. Suffice it for all the purposes of this appeal that there is a *bona fide* dispute between the parties as to the existence of the partnership averred in the bill, and a substantial doubt enveloping that issue, and that it clearly appears—the contrary not being alleged—that Irwin, who denies the partnership, and has possession of the property claimed to constitute its assets in part, is entirely solvent, amply able to respond fully to any measure

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of relief which can possibly be decreed to the complainant on the facts set forth in his bill. In such case, the Chancery Court should not intervene by its receiver. To do so—thus, without any concession of the existence of a partnership, but on the contrary in the face of a *bona fide* denial of the fact, and in advance of any final determination that the alleged relation does exist—might well be to take from the defendant property in which the complainant has no interest, and subject it to an expensive and exhausting administration on the joint account of parties, one of whom is in fact without any right in the premises, only to the end of ultimately adjudging it to be the defendant's property, and making restitution to him of such of its proceeds as have not been expended under the receivership, and all this when, even from the point of view of the complainant, his rights could be fully conserved by a mere accounting between the parties, and the enforcement of the decree for any balance in his favor against the property of the defendant. *Peacock v. Peacock*, 16 Ves. 49; *Fairborn v. Pearson*, 2 Mac. & G. 144; *Goulding v. Bain*, 4 Sand. 716; *Hobart v. Ballard*, 31 Iowa, 521; *Williamson v. Monroe*, 3 Cal. 383; *Popper v. Shreider*, 7 Abb. Pr. 56; High on Receivers, §§ 476-7-8.

The Chancellor, in our opinion, erred in appointing the receiver; and his order in that behalf is reversed, and it is here ordered that the receiver be discharged.

Reversed and rendered.

Aderhold v. Blumenthal & Beckert.

Trover against Landlord, by Purchaser from Tenant.

1. *Landlord's lien on tenant's goods, for rent of storehouse.*—A landlord's statutory lien for rent, on the goods, furniture and effects of his tenant in the rented storehouse (Code, §§ 3069-70), is not displaced or affected by a sale of the goods by the tenant to a creditor who had knowledge or notice of the landlord's lien, or of the fact that the goods were in a rented house; and if the purchasing creditor had such knowledge or notice, the ignorance of his agent or attorney who effected the purchase can not avail him.

2. *Same; conclusiveness of judgment; defenses available to purchaser.* The landlord having obtained a judgment in his attachment suit against his tenant, and being sued in trover by the purchasing creditor, the judgment is conclusive of his right to maintain the action, and can not be assailed by the purchaser on the ground that, before suing out the attachment, he had transferred the notes for rent to a

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third person as collateral security, and was not the owner of them; but the purchaser may assail the judgment on the ground of fraud, or because it was not founded on a debt for rent, or because the debt was in fact paid.

APPEAL from the City Court of Anniston.

Tried before the Hon. B. F. CASSADY.

This action was brought by Blumenthal & Eckert, suing as partners, against T. M. Aderhold and H. W. Finney, to recover damages for an alleged conversion of certain goods and chattels, consisting of chairs, table, furniture, fixtures, crockery, &c.; and was commenced on the 29th April, 1889. The goods and chattels had belonged to one Harry Toole, and were used by him in carrying on a restaurant in a house which he had rented from said Aderhold, one of the defendants, for and during the year 1889; the annual rent being \$900, and payable in monthly installments. On the 14th February, 1889, Aderhold, as landlord, sued out an attachment for rent against said Toole; and the attachment was levied by Finney, one of the defendants, as deputy-sheriff, on said goods and chattels, while yet in the rented house. On the 8th May, 1890, the plaintiff in attachment recovered judgment by default against the defendant, for the amount claimed, \$550, besides costs; and the judgment-entry adds, "then came plaintiff, by his attorney, and acknowledges satisfaction of the above judgment."

The plaintiffs claimed the goods under a purchase from said Toole, and offered in evidence what purported to be a bill of sale, dated February 8th, 1889; but it contained no words of conveyance, being in these words: "Know all men by these presents, that I, Harry Toole, for and in consideration of \$365 to me in hand paid by Blumenthal & Beckert, of Atlanta, Georgia, the following described personal property," describing it; "and further, said Blumenthal & Beckert agree to assume and pay off a mortgage on said property," describing said mortgage. In connection with this writing, the plaintiffs offered in evidence a writing signed by A. D. Meador as agent of plaintiff, dated on the 8th February, 1889, by which he rented to said Toole the personal property mentioned in the said bill of sale, for one week, for the sum of \$5.00, "with the privilege of renting said property for one week after expiration of specified time." Said Toole testified that, at the time the attachment was levied, he was in possession of the goods "under said contract between him and plaintiffs above set out"; that he had notified plaintiffs, prior to the sale to them, "that the house he was occupying was rented, and they knew he

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owned no real estate in the county"; and that none of his notes for rent were due when the attachment was sued out. A. D. Meador, who, as agent and attorney for plaintiffs, made the purchase of the goods, testified that he did not know Toole was in a rented house, nor that the house belonged to said Aderhold, but he had just removed to Anniston, and he made no inquiries. J. E. Aderhold, a witness for defendants, who had made the affidavit for the attachment, testified that the notes for rent, at that time, were held by one Lewis, to whom they had been transferred as collateral security by T. M. Aderhold, being indorsed in blank; and that said notes, as they matured, were each "taken up" and paid by him as indorser; and the notes were produced on the trial. It was shown, also, that the goods were almost entirely destroyed by fire, while in the possession of the sheriff under the levy of the attachment.

On these facts, a jury having been waived, the court decided the issues in favor of the plaintiffs, and rendered judgment for them for \$562, the value of the goods. The defendants excepted to this ruling and judgment, and they here assign it as error.

CALDWELL & JOHNSTON, for appellants.—The landlord's lien on the goods can not be doubted, and it was clearly proved that plaintiffs had notice of it.—Code, § 306½; *Lomar v. Le Grand*, 60 Ala. 537; *Herbert v. Hanrick*, 16 Ala. 581. The transfer of the tenant's notes as collateral security did not take away the landlord's right to sue for the rent, and the judgment in the attachment case is conclusive of his right to maintain the action.—Code, § 2594; 88 Ala. 336; 82 Ala. 384; *Jones on Pledges*, § 651. Appellants further suggest that plaintiffs showed no title in themselves to the property, the alleged bill of sale containing no words of conveyance.—78 Ala. 111-14.

GORDON MACDONALD, and BLACKWELL & KEITH, *contra*.—A landlord who has indorsed his tenant's note for rent to a third person, as collateral security for a debt, can not sue out an attachment based on it before that debt is paid. *Ware, Murphy & Co. v. Russell*, 57 Ala. 43; *Cocke v. Cheney*, 14 Ala. 65; *Pickens v. Yarborough*, 26 Ala. 417; 2 Rand. Com. Paper, § 795, and citations.

COLEMAN, J.—The goods, when purchased by plaintiffs, were in a rented storehouse, and subject to the landlord's lien.—Code, § 3069. The goods were purchased in bulk, Vol. 95.

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and the consideration was the payment of an antecedent debt. Moreover, the goods had not been removed from the storehouse when they were levied upon at the suit of the landlord, by attachment for the enforcement of his rent debt. The sale of the goods by the tenant did not displace the prior lien of the landlord.—*Weil v. McWhorter*, 94 Ala. 540. It was proven by the witness Toole, and not controverted, that appellees knew that Toole occupied a rented storehouse.—*Lomax v. LeGrand*, 60 Ala. 537; *Boggs v. Price*, 64 Ala. 514; *Scaife v. Stovall*, 67 Ala. 237. Having notice themselves, the ignorance of their attorney and agent, Meador, through whom the goods were purchased, can not avail them.

It is contended that, as Aderhold, the landlord, had transferred the rent notes of Toole to Lewis, as collateral security to a debt he was owing to Lewis, and as the rent notes were so held by Lewis when the attachment for the rent was sued out by the landlord against the tenant, the Circuit Court had no jurisdiction of the case, and that the judgment rendered is a mere nullity. This position is untenable, under the facts disclosed in the record.

The proceedings of the attachment suit in the Circuit Court on their face were in all respects regular. The court had jurisdiction of the persons and subject-matter. Its judgment is conclusive, as between the landlord and tenant, of the amount due for rent, and that it was due the landlord. The defendant in that suit, if the facts justified it, might have shown that the plaintiff did not own the debt, and was not the proper person to sue; but a stranger to that suit can not show, in a collateral proceeding, that the plaintiff was not the owner of the claim, and not entitled to maintain the action. If the holder of the collateral nor the debtor objects to the party suing, a stranger to the action can not interfere to defeat the suit, or after judgment impeach its validity as between the parties to the suit. The case of *Ware v. Russell*, 57 Ala. 43, is not in conflict with this principle.

Plaintiffs having shown title to the property by their purchase from the tenant, it was competent for them to impeach the judgment obtained by Aderhold, the landlord, against Toole, his tenant, for fraud, or to have shown it was not founded on a rental debt, or that the debt had in fact been paid. As to these questions, the judgment in the Circuit Court was, as to the plaintiffs in this suit, *res inter alios acta*.—*Dryer v. Abercrombie*, 57 Ala. 497; *Boswell v. Carlisle*, 55 Ala. 554.

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It having been shown, however, that Toole was indebted for the rent of the storehouse; that the landlord's lien attached to the goods for the rental debt; that he sued out an attachment for rent, which was levied upon the goods in the storehouse subject to the landlord's lien, and this attachment was prosecuted to judgment in the Circuit Court; the validity of this judgment and sale of the property under the attachment can not be impeached or invalidated by proof that the rent notes upon which the attachment issued had been transferred as collateral security before the suing out of the attachment; and this would be true, even though it had not been proven, as it was, that after the attachment issued, and before judgment, the debt for which the rent notes were hypothecated as collateral security was fully paid by the landlord, and the rent notes returned to him.

It is thought that these principles will be sufficient to guide the court on another trial, without noticing in detail the several questions raised by the pleadings. The ruling of the trial court did not accord with the principles of law as here declared, and the conclusion reached was not authorized by the evidence.

The judgment is reversed, and the cause remanded.

Bledsoe v. Gary & Kennedy.

Bledsoe Bros. v. Gary & Kennedy.

Attachment; Contest of Claim of Exemption.

1. *Who may issue attachment.*—The judge of the City Court of Selma being invested by statute with all the powers and authority conferred on the judges of the Circuit Court, "including the authority to issue writs of injunction, *mandamus*, *certiorari*, prohibition, *ne exeat*, and all other remedial writs," and a judge of the Circuit Court having express authority to issue attachments returnable to any county in the State (Code, § 2931), the judge of said City Court may issue an original attachment, which is a remedial writ, returnable to any county in the State.

2. *Claim of exemption of personalty; subsequent levy, contest, and notice.*—When a declaration and claim of exemption to personal property has been duly filed in the proper office, the property specified is not subject to subsequent levy, unless the claim is contested as provided by the statute, or a waiver of exemptions is shown by the process (Code, §§ 2519-20; but the defendant is entitled to notice in writing of the levy, though it is not necessary for the notice to state the fact that the claim is contested.

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3. *Same; demand of inventory; judgment by default.*—Demand in writing for an inventory (Code, § 2525) is not the equivalent of notice of the levy and contest: and if the defendant then files an inventory, not being in default, it can not be struck from the files because not filed within the first three days of the term: and being improperly struck from the files, the plaintiff is not entitled to judgment by default, but should tender an issue.

4. *Same; waiver of notice.*—If the defendant, not having notice of the levy and contest, and not being in default, appears and files an inventory, which is improperly struck from the files, and he then files a plea in bar, this is a waiver of the want of notice, and authorizes a personal judgment against him.

APPEALS from the Circuit Court of Marengo.

Tried before the Hon. WM. E. CLARKE.

The records in these two cases show these facts: On the 8th February, 1890, a declaration and claim of exemption to certain personal property, consisting principally of a stock of goods, was made and filed of record in the office of the probate judge of Marengo county, by Henry T. Bledsoe. Afterwards, but on the same day, an attachment was sued out against said Henry T. Bledsoe and William Bledsoe, as partners composing the firm of Bledsoe Brothers, in favor of Gary & Kennedy as creditors. The affidavit for the attachment was subscribed by T. P. Gary, one of the plaintiffs, but his name was not mentioned in the body of the affidavit, a blank space being left instead; and it was made before Hon. JONA. HARALSON, the judge of the City Court of Selma, who thereupon issued an attachment, returnable to the next term of the Circuit Court for Marengo county. On the 10th February, 1890, the plaintiffs filed their summons and complaint in the Circuit Court of Marengo, against said Bledsoe Bros., the summons describing the defendants as "Bledsoe Brothers, a firm composed of H. T. and William Bledsoe;" and the complaint contained the several common counts, each claiming \$407.22, as due January 1st, 1890. On the 15th February, 1890, an affidavit contesting the claim of exemption was made before a notary public by T. P. Gary, one of the plaintiffs, though his name is not signed to it, nor is there any indorsement showing that it was delivered to the sheriff; and plaintiffs also gave bond conditioned for the successful prosecution of the contest, which was delivered to the sheriff on the 16th February, 1890, as shown by his indorsement on it. On the 17th February, 1890, the sheriff levied the attachment on the stock of goods; and on the same day, plaintiffs having demanded that defendant file an inventory of his property, a copy of this demand was served on said H. T. Bledsoe.

At the ensuing term of the court, as shown by a minute

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entry dated March 6th, 1890, the cause was "continued by operation of law;" and nothing else is shown to have been done during that term. On the 23d September, 1890, which was a day of the next succeeding term, the defendant filed an inventory of his property in response to the demand; and on the same day, the cause coming on for trial, the plaintiffs moved to strike this inventory from the file, "on the ground that it was not filed within the first three days of the term to which the process was returned;" which motion the court sustained, and the defendant excepted. "Thereupon," as the judgment-entry recites, and the bill of exceptions states, "plaintiffs moved the court to render judgment by default against said defendant;" which motion the court granted, and the defendant excepted. On a subsequent day of the term, the defendant submitted a motion in arrest of judgment, "(1) because the record fails to show that written notice of contest was ever given by the sheriff or clerk to said Henry T. Bledsoe; (2) because the record shows that the levy was made on 17th February, and court convened on March 3d following, and inventory was filed September 23d, 1890; and for the manifest defects in the record aforesaid appearing." The court overruled the motion in arrest, and the defendant excepted.

The main attachment case coming on for trial on the same day, the defendant H. T. Bledsoe "moved the court to dismiss the levy of the attachment, on the ground that the affidavit and writ of attachment fail to show that the suit is on a contract waiving exemptions, or that a contest of exemptions had been instituted;" which motion the court overruled, and said defendant excepted. The court then allowed the plaintiff to amend the attachment, by adding an indorsement by the sheriff in these words: "The claim of exemptions by the declaration of exemptions of the defendant, on file for record in the probate office of Marengo county, is contested by plaintiffs in this suit;" and to the allowance of this amendment defendants excepted. Said H. T. Bledsoe then "moved the court to dissolve the attachment, on the ground that the suit is against the property of Henry T. and William Bledsoe, partners under the firm name of Bledsoe Bros., and was levied on the property of said H. T. Bledsoe individually;" which motion the court overruled, and said Bledsoe excepted. Said H. T. Bledsoe then offered to file a plea in abatement, on the ground that the indorsement which the court had permitted the sheriff to put on the writ of attachment "was not a proper and sufficient indorsement under section 2571 of the Code;"

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and permission to file this plea being refused by the court, on objection by plaintiffs, said Bledsoe excepted. The general issue being then pleaded, in short by consent, a verdict was rendered for the plaintiffs. The defendants then moved in arrest of judgment, on the grounds above stated, and further, because the attachment was void for want of authority in Judge Haralson to issue it. This motion was overruled, and the defendants excepted.

Bledsoe Brothers appeal from the judgment rendered against them in the attachment case, and assign as error the several rulings above stated; and H. T. Bledsoe also appeals from the judgment rendered against him on the contest of the claim of exemptions, assigning as error the several rulings to which he excepted.

GEO. B. JOHNSTON, for appellants.

N. H. R. DAWSON, and JNO. C. ANDERSON, *contra*.

WALKER, J.—The writ of attachment in this case was issued by the judge of the City Court of Selma, and was made returnable to the next term of the Circuit Court of Marengo county. The judge of the City Court of Selma was, by the terms of the act creating that court, and of the amendment thereto, clothed with “all the powers and jurisdiction which are now or may hereafter be lawfully exercised by the judges of the Circuit Court and chancellors of this State, including the authority to issue writs of injunction, *mandamus*, *certiorari*, prohibition, *ne exeat*, and all other remedial writs.”—Acts of Ala. 1875–76, p. 386; Acts 1876–77, p. 266. This court has held that the language just quoted confers upon the judge of the City Court the authority to issue, or to order the issue of the writs referred to, returnable into any court of the State having jurisdiction of them. *East & West R. R. Co. v. East Tenn., Va. & Ga. R. R. Co.*, 75 Ala. 275. Under the general statute, a writ of attachment may be issued by any judge of the Circuit Court, returnable to any court in the State.—Code 1886, § 2931. The writs of attachment against property which are authorized by our statutes are remedial writs within the meaning of the language above quoted. The plain effect of that language is to confer upon the judge of the City Court of Selma the same authority to issue attachments returnable to any county in the State as is vested in the judges of the Circuit Court.

Before the levy of the writ of attachment the defendant Henry T. Bledsoe had filed in the office of the judge of pro-

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bate his declaration stating and describing the personal property claimed by him as exempt, and such declaration had been duly recorded. As there was no indorsement on the process that there had been a waiver of exemptions as to personalty, the property embraced in the declaration was not subject to levy, unless the claim of exemptions was contested.—Code, § 2519; *Tonsmere v. Buckland*, 88 Ala. 312. When a contest has been instituted in the mode prescribed by section 2520 of the Code, the officer holding the process shall proceed to make a levy, and within three days thereafter shall notify the defendant in writing of the same. The last clause of this section seems to require the officer to notify the defendant of the levy only, and not of the contest; but section 2522 speaks of the service of notice of contest in such a way as to indicate that the service of such notice is required in any contest of a claim of exemption to personal property. It seems to have been the intention of the legislature that the written notice to the defendant of the levy of process upon property which he had already claimed as exempt should also operate as notice to him of the institution of a contest of his claim of exemptions. Provision is also made elsewhere for notice to the defendant in all cases of the levy of a writ of attachment.—Code, § 2937. Whether or not the contest itself should be mentioned in the written notice to the defendant, it is plain that he is not put to his defense of his claim of exemptions against process subsequently issued until he has been notified in writing of the levy of such process. A person who has duly filed his declaration claiming personal property as exempt, before the levy of process upon it, is entitled to treat the filing of such declaration as a protection of the property therein described against process upon which the fact of a waiver of exemption is not indorsed until, in the mode prescribed in the statute, he is brought into court to defend a contest of his claim of exemptions. He is made a party to the contest by the service of written notice of the levy of the process. The service of such notice is the mode prescribed by the statute of citing the defendant to appear and support his claim of exemption. The provision for giving him notice is what secures to him the opportunity to be heard upon the question of the validity of his claim. Some such provision for notice to the defendant is necessary to give the statutory proceeding for a contest in such a case the character of due process of law.—*Betan-court v. Eberlin*, 91 Ala. 461. At any rate, the requirement that notice shall be given is one not to be disregarded.

In the present case, the plaintiffs made the affidavit and
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bond for a contest in the mode prescribed by section 2520 of the Code, and the writ of attachment was levied on February 17th, 1890. But there is nothing to show that the defendants were notified in writing of the levy, or that they had any actual notice thereof. The notice to the defendant H. T. Bledsoe to file an inventory makes no mention of the writ of attachment, and does not state that any process had been levied. On September 23d, 1890, he waived his right to such notice by appearing and filing his inventory. He was not in default up to that time, because he had not been served with the statutory notice of the levy, and had done nothing to waive such notice. Prior to his voluntary appearance the steps had not been taken to entitle the plaintiff to a judgment on the contest, the contestee not having been brought into court by the service of notice of the levy, which is required by the plain language of the statute.—Code, § 2520; *Fears v. Thompson*, 82 Ala. 294; *Hutcheson v. Powell*, 92 Ala. 619. On the plaintiff's written demand, a defendant who has been made a party to a contest of his claim of exemption is required, under the penalty of having a judgment by default rendered against him in the contest, to file an inventory of his personal property.—Code, § 2525. But a notice merely to file such inventory is insufficient to supply the want of the notice which is required to make the defendant a party to the contest. The law informs him that until he has received written notice of the levy of process he is not called upon to defend a contest of his previously filed declaration and claim of exemption, and until he has received such notice he can safely ignore the plaintiff's proceedings, so far as they purport to affect property already claimed as exempt. Until the defendant became a party to the contest he was not bound to comply with the plaintiff's written demand for an inventory. He did not become a party to the contest until his voluntary appearance therein at the September term of the Circuit Court. He filed the inventory on the day of his voluntary appearance. The trial court erred in striking the inventory from the files, on the ground that it had not been filed within the first three days of the previous term. The defendant had not then been put in the position to be bound by the plaintiff's demand; when he voluntarily appeared he was not in default in any way, and it was incumbent on the plaintiffs to tender an issue on the claim. It was error to render judgment by default thereon against the defendant, because he was not then in default, as he had not been made a party to the contest in the mode prescribed by the statute. He had done

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nothing to relieve the plaintiffs of the duty of tendering an issue on the claim of exemptions. An issue should have been formed and tried as directed by the statute.—Code, § 2526.

If there has been a waiver of exemption as to the kind of property on which the levy is sought to be made, the indorsement of that fact on the process is a pre-requisite of the right to make the levy.—Code, § 2519. If there has been no such waiver, and the right to make the levy is based upon the institution of a contest in the mode provided by section 2520 of the Code, there is no requirement that the fact of such contest shall be indorsed on the process. The defendant H. T. Bledsoe, in his plea in abatement, and in his motion to dismiss the levy of the attachment, seems to have erroneously assumed that the statute requires the fact of contest to be indorsed on the process. No such indorsement was required, and the absence thereof did not affect the validity of the levy. The indorsement made by the plaintiffs upon the writ at the time of the trial was useless and ineffectual. No injury resulted therefrom to the appellant.

The appellant's plea in abatement and his motion to dismiss the levy of the attachment were both put upon the untenable ground, that there should have been an indorsement on the writ of the fact that the claim of exemptions was contested; and for this reason both the plea and the motion were properly rejected. After these objections were disposed of, the appellant interposed a plea in bar to the complaint, without suggesting the objection that he had not been served with written notice of the levy of the attachment. He thereby waived the right to such notice, and a personal judgment could then be rendered against him, though he had not been served with any legal process at all. After a voluntary appearance and the rendition of a personal judgment thereon, the objection because of the failure to give written notice of the levy of the writ of attachment was too late. That objection was cured by the voluntary appearance of the defendant.

So far as the proceeding in the main case was concerned, we have discovered no error prejudicial to the appellant. The judgment in that branch of the case is affirmed. For the reason above stated the judgment rendered on the contest of the claim of exemptions is reversed, and that case is remanded.

Reversed and remanded.

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Action on Policy of Insurance against Fire.

1. *Ownership of insured property; representations as to, and proof.* In an application for a policy of insurance on a storehouse, a statement or representation, in answer to one of the printed questions, that the applicant has a "fee-simple title," only means that he owns the absolute beneficial interest, as contradistinguished from a limited, qualified, or conditional interest; and in an action on the policy, he may testify that he bought and owned the property, without producing his deed, or proving payment of the purchase-money.

2. *Notice and preliminary proof of loss.*—Notice and preliminary proof of the loss having been promptly furnished, and no objection made to them in reply, after which the company's adjuster was sent to the place, who only objected to the valuation of the property as excessive, and insisted that the counters and shelves were not insured as a part of the house, this amounts to a waiver of all objections to the sufficiency of the notice or preliminary proof.

3. *Counters and shelves as part of storehouse.*—Counters and shelves in a storehouse may be insured as part of the house itself, when built or let into the walls or frame thereof, though not expressly mentioned in the application or the policy; and it is for the jury to determine from the evidence whether they are part of the house or not—whether they are movable or immovable fixtures.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Caldwell Brothers, a mercantile partnership doing business at Scottsboro, Alabama, against the appellant, a domestic corporation, whose principal place of business was at Montgomery; and was founded on a policy of insurance of a storehouse at Scottsboro against fire, which the defendant had issued to the plaintiffs. The house was a two-story frame building, in which the plaintiffs carried on their mercantile business; and it was insured by the policy for \$1,500. The policy was dated December 9th, 1884, and was for the term of one year. The house was totally destroyed by fire on Christmas night, 1884, and the action was brought on the 17th September, 1885. The complaint contained a single count, which was in the form prescribed by the Code, Form No. 13, p. 792. The defendant filed five pleas, but a demurrer was sustained to the 5th plea, and its sufficiency is not considered by this court, though presented by the assignment of errors. The

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first plea alleged generally that "the facts stated in the complaint are not true." The 2d plea alleged that one of the conditions of the policy required that the insured should, "within fifteen days after loss accruing, give written notice thereof to defendant, and render to defendant on oath, within sixty days after such loss, a particular account of such loss, stating the time, cause, and circumstances of the fire, the occupation of the building insured, and the value of such building; and that plaintiffs had not complied with this condition. The 3d plea alleged that the plaintiffs' application for insurance stated that the amount of insurance asked on the building was not more than three-fourths of its cash value, and that \$1,500, the amount of the policy, was more than three-fourths of the value of the property. The 4th plea alleged that the policy contained a provision giving the insurance company an option, in the event of a loss, to rebuild the house, and that the plaintiffs would not assent to such rebuilding, on the defendant's offer to rebuild within a reasonable time after the loss. Issue was joined on each of these pleas.

On the trial, as the bill of exceptions shows, the plaintiffs offered the policy in evidence, the first provision of which was in these words: "The application and statements of the assured, concerning the risk, are the basis of this contract; and any misrepresentation, or omission to make known every material fact concerning the risk, shall vitiate this policy; . . . and if the exact interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in the policy, then this policy shall be void." Another provision in the policy was in these words: "(5.) Persons sustaining loss or damage by fire shall forthwith give notice of such loss, and shall, as soon as possible thereafter, render preliminary proof, giving an accurate and particular account of such loss or damage, signed and sworn to by them, and shall produce such other evidence, and submit to such examination, as the manager or any person appointed by this company may require; which statement shall be accompanied with a certificate from a magistrate or notary public nearest to the place of fire, . . . that he has examined the circumstances attending the loss, and verily believes that the assured has honestly and through misfortune sustained a loss on the property insured; and until such proof, declaration and certificates have been produced, and such examinations as may be required have been permitted by the claimant, the loss or any part thereof shall

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not be due or payable." The policy also contained a provision giving the company the option to rebuild in the event of a loss. The policy was signed by the president and secretary of the defendant company, but beneath their names was written a memorandum in these words: "Dated at Huntsville, Ala., this 9th December, A. D. 1884, and issued there;" and this was signed, "*H. B. Dillard*, secretary, agent for said company."

The application for the policy, which was read in evidence by the defendant, was made out on one of the printed forms of the Home Protection Company of North Alabama, but the name of that company was erased, and that of the defendant in this case substituted. The application was made out by *W. G. Stuart*, who was the agent at Scottsboro of said Home Protection Company, and it was forwarded by him, by mail, to said *H. B. Dillard*, the secretary of said company at Huntsville. In the printed part of this application it is stated, that the answers and statements therein made "form part and parcel of the policy, as well as the warranty of the applicant." The original application was sent to this court for inspection, and the opinion states the material facts shown by it. There was no objection to the admission of the application and the policy, or either of them, as evidence.

The plaintiffs proved that, on the day after the fire, they sent a letter by mail to said *Dillard*, at Huntsville, and another on the 22d February, 1885, in reference to the matter. The first letter was in these words: "Our storehouse, for which we hold insurance policy in the Capital City Insurance Company, No. 6,529, to the amount of \$1,500, was burned last night; cause unknown. Please accept this as notice, and advise us of proper steps for a settlement." The other letter was in these words: "To-day is the 59th day since we were burned out. Your adjuster has not yet been here. What does he intend to do? or what more does he want us to do? We received a letter saying that he would be here last week, but we have not seen him. Please let us have some satisfaction in regard to this matter, as we think we have waited long enough." The plaintiffs proved, also, that some time in March, 1885, *J. B. Abrams*, the adjuster of the defendant company, came to see them at Scottsboro, accompanied by a contractor, who made an estimate of the cost of rebuilding; but nothing came of this interview, as the adjuster insisted that the counters and shelves were not included in the policy, and would not include them in the estimate of the cost of rebuilding; and he

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further insisted that the house was over-valued in the policy. The plaintiffs offered in evidence, also, a letter which they had received from said Abrams, dated at Montgomery, April 1, 1885, in these words: "The papers sent by you, under date of March 21st, purporting to be proofs of loss under your policy, No. 6,529, have been referred to me. I beg to say in reply, these papers are wholly insufficient as such proof of loss required of you under the conditions of the policy. You say the value of the building was about \$2,400, without the plan, or specification, or any particular statement or estimate, showing how this amount had been reached. Based upon the paper you have submitted, the company has no means of testing the correctness or incorrectness of the value you fix upon the building in question. The company requires the plan and specifications of the building in detail, and the papers you have sent in are therefore held at the company's office subject to your order. You are respectfully referred to the 5th paragraph of your policy."

E. H. Caldwell, one of the plaintiffs, was examined as a witness in their behalf, and his testimony, in the form of question and answer, is set out in full in the bill of exceptions; two exceptions reserved being thus stated: "Q. 'To whom did the building belong?' A. 'Caldwell Brothers. (Defendant objects, objection overruled, and defendant excepts.)' "Q. 'What did you do after this [that is, sending the first letter] in reference to having a reference made?' A. 'I made a sworn statement.' (Defendant objects, objection overruled, and defendant excepts.)" Other parts of the testimony of said Caldwell are copied in the opinion of the court, and other exceptions to rulings on evidence were reserved, but they are not assigned as error.

The court instructed the jury as follows: (1.) "It is incumbent on the plaintiffs to prove to your satisfaction that, after the fire, they gave notice of their loss to the defendant or its agents, and as soon thereafter as possible their preliminary proofs, giving an accurate and particular account of such loss or damage, signed and sworn to by them, accompanied by a certificate from a magistrate or notary public, certifying that he examined the circumstances, and verily believes that they have honestly, through misfortune, sustained a loss on the property insured; or prove to your satisfaction that the defendant, through its agents, received notice of such loss and proofs as stated. And if you believe from the evidence that Abrams was adjuster for defendant, with authority to adjust such loss, and went to Scottsboro, Vol. 95.

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and tried to adjust such loss with plaintiffs, and did not insist on non-payment because of absence of proof of loss and want of notice as required by the 5th condition of the policy, you may look to such visits, &c., to ascertain whether defendant did in fact waive such proof of loss and notice required as above stated." (2.) "If you believe from the evidence that the counters and shelves were built along with the storehouse and as a part thereof, by being fastened to the sleepers, and could not be removed without injury to the house; then they are not fixtures, but a part of the building, and are embraced by the policy. But, if you believe they were not so built, but were merely [*laid?*] upon the floor and attached against the walls, and could be removed without injury to the house; then they are fixtures, are not a part of the building, and are not embraced in the policy."

The defendant excepted to each of these charges, and asked fifteen charges in writing, duly excepting to the refusal of each. The first of these charges was the general charge on the evidence, the third is copied in the opinion, and the others were in these words:

(2.) "Under the terms and conditions of the policy, it was necessary and incumbent upon plaintiffs to state their exact interest in the property, whether as owners or otherwise. The interest of Snodgrass, according to the evidence, had not been divested out of him, and the statement made by plaintiffs, that they had the fee-simple title, avoids the policy, and the verdict of the jury should be for the defendant."

(4.) "If the jury find from the evidence that the plaintiffs, in the application for insurance, state they had the fee-simple title to said building, and it is not shown that Snodgrass conveyed his interest to George Caldwell, or Caldwell Brothers, by a proper deed of conveyance, then the fee-simple title was not vested in Caldwell Brothers, the policy is void, and the plaintiffs can not recover."

(5.) "If the storehouse insured by said policy was occupied by Caldwell Brothers, and not by Snodgrass & Caldwell, the plaintiffs are not entitled to recover, and the verdict of the jury should be for the defendant."

(6.) "The plaintiffs are required by the conditions of the policy, in connection with the preliminary proof giving an accurate and particular account of the loss or damage, signed and sworn to by them, to send to defendant a certificate from a magistrate or notary public, nearest to the place of fire, and not concerned in any way in the loss, or

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related to the plaintiff, certifying that he has examined the circumstances attending the loss, and verily believes that the plaintiffs have honestly, and through misfortune, sustained a loss on the property insured. There is no evidence that the plaintiff complied with this condition of the policy; and for this reason the plaintiffs are not entitled to recover, and the verdict of the jury should be for the defendant."

(7.) "Under the conditions contained in said policy, it was optional with the defendant to repair, rebuild, or replace the property with other of like kind and quality within a reasonable time, on giving notice of their intention to do so. If the defendant offered to so rebuild, and the plaintiffs refused to permit such rebuilding, unless the defendant would furnish shelving and counters, the plaintiff can not recover in this case, as the shelving and counters were not insured under said policy."

(8.) "The deposit in the post-office of a statement of the preliminary proofs, as required by the policy, at Scottsboro, Alabama, and addressed to H. B. Dillard, secretary, or to Home Protection Insurance Company, as agent, was not a delivery of such proof to them, and could not operate to fulfill the requirements of the contract, that such proofs of loss should be rendered to the company."

(9.) "There is no evidence in this case that the defendant has waived the conditions in said policy requiring the plaintiffs to render preliminary proofs of the alleged loss, giving an accurate and particular account of such loss, signed and sworn to by them, accompanied by a certificate from a magistrate or notary public, as provided by the said policy."

(The 10th charge, as copied in the transcript, is not intelligible.)

(11.) "The preliminary proofs should have been sent to the defendant, at Montgomery, Alabama, and not to the Home Protection Insurance Company, at Huntsville, Ala., or to the secretary of said Home Protection Insurance Company, H. B. Dillard."

(12.) "The letter purporting to have been written by J. R. Abrams, dated Montgomery, Ala., 4-1, 1885, is not evidence in this case."

(13.) "Under the terms of the policy, the ascertainment of the amount of the loss, by Mr. J. R. Abrams, the adjuster, did not decide or fix the liability of the defendant, and no question can arise, in this case, as to defendant's
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waiving any condition required by the contract of insurance, to be performed by the plaintiffs."

(14.) "The answers made by the plaintiffs to the questions propounded in the application, are warranted by them to be true, whether material or not; and if any of said answers are found to be untrue, the policy is void, whether the answers are material or not, and the verdict of the jury should be for the defendant. The jury have nothing to do with the materiality of such answers.

(15.) "The plaintiffs are required under said policy, when sustaining loss or damages, as soon thereafter as possible to render preliminary proofs, giving an accurate and particular account of such loss or damage, signed and sworn to by them. There is no evidence that the plaintiffs have complied with this condition of the policy, and for this reason they are not entitled to recover; and the verdict of the jury should be for the defendant."

The charges given by the court, the refusal of the several charges asked, the two exceptions to the testimony of Caldwell as above stated, and the sustaining of the demurrer to the fifth plea, are assigned as error.

LAWRENCE COOPER, for appellant.—(1.) The application for the policy and the policy itself are to be construed together as parts of one and the same contract, each expressly referring to the other; and the statements in the application being in the nature of warranties, a misrepresentation avoids the policy, especially where it is as to a material matter.—1 Wood on Fire Insurance, § 50; May on Insurance, §§ 29,159; *Chaffee v. Insurance Co.*, 18 N. Y., 376. (2.) The interest of the assured in the property is material to the risk, and he is required to make a full and true statement of the facts relating to it.—*Williamson v. N. O. Fire Asso.*, 84 Ala. 106; *Western Asso. v. Stoddard*, 88 Ala. 606; 28 Central Law Journal, 6. The assured represented that they had a "fee-simple title" to the property insured, and their evidence fails to show that they had any legal title whatever. One of them may have had an equitable fee simple in the lot, but, if he had any conveyance, or written evidence of title, the fact was not proved. Snodgrass had an interest in the building, which he sold to one of the assured; but whether by written contract or by parol was not shown, nor was it shown that the purchase-money had been paid. The misrepresentation as to the title or interest of the assured avoids the policy.—*Phoenix Insurance Co. v. Browder*, 19 Amer. St. 326. Besides, exceptions were re-

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served to the competency of the evidence as to the title of the assured, and these exceptions are assigned as error. (3.) The counters and shelves were not covered by the policy.—1 Wood on Fire Insurance, § 56. (4.) The instructions of the court as to the waiver of notice and proof of loss were erroneous.—*Insurance Co. v. Oates*, 86 Ala. 558; *Insurance Co. v. Young*, 86 Ala. 424. (5.) A complaint in the statutory form is a bare statement of legal conclusions, and a plea of the general issue imposes on the plaintiff the burden of proving all the material facts necessary to support those conclusions.—*Ala. Gold Life v. Mutual Insurance Co.*, 81 Ala. 329; 2 Greenl. Ev., § 404; 2 Wood on Fire Insurance, 519; 28 Central L. J. 5, 6.

HUMES & SHEFFEY, *contra*.—(1.) There was no special plea setting up a breach of warranty of title, and that defense was not available under the general issue.—Code, § 2675, and citations. (2.) There was no evidence whatever to support the second plea, the conditions of the policy as to notice and proof of loss being substantially variant from the allegations of the plea. (3.) The only objection made by the adjuster to plaintiffs' notice and proof of loss was, that the plans and specifications of the building were not furnished; and this was a waiver of all other objections, if any existed.—*Insurance Co. v. Felrath*, 77 Ala. 201; 5 Lawson's Rights and Remedies, 3544. The adjuster afterwards went to Scottsboro, accompanied by a contractor, to whom a particular description of the destroyed building was submitted, with a view to estimates for re-building.—*Insurance Co. v. Oates*, 86 Ala. 569; *Insurance Co. v. Allen*, 80 Ala. 571; *Badger v. Insurance Co.*, 49 Wisc. 389; *Fisher v. Crescent Insurance Co.*, 33 Fed. Rep. 544; 7 Amer. & Eng. Encyc. Law, 1054; 11 *Id.* 341. The notice and proofs of loss submitted by plaintiffs were in the defendant's possession, and were not produced on the trial. (4.) The shelves and counters, if part of the building, were covered by the policy; and the question whether they were part of the building was properly submitted to the jury.—*Tillman v. DeLacy*, 80 Ala. 103; *Insurance Co. v. Allen*, 80 Ala. 578; 27 Mich. 289; 8 Amer. & Eng. Encyc. Law, 41–61. (5.) The policy described the insured building as occupied by Snodgrass & Caldwell, when in fact it was occupied by Caldwell Brothers; but defendant can not take advantage of this fact, since it was the mistake of its own agent.—*Assurance Co. v. Stoddard*, 88 Ala. 611; 84 Ala. 106; 11 Amer. & Eng. Encyc. Law, 302; Vol. 95.

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5 Lawson's R. & R. 3594. (6.) The letter of Abrams, the adjuster, was admitted without objection.

STONE, C. J.—All men know that, in cities and towns, business houses generally, and residences frequently, are constructed in such close proximity, that the loss of one by fire endangers others. It is on this account that fire-insurance companies, in placing their risks, take into the estimate what are called the exposures, and regulate the premiums they charge for insurance in reference thereto. So, if the building proposed to be insured be very valuable, and the sum to be insured be large, it is not customary to place the entire risk in one company, but in several. This, because if loss is suffered (and losses will be suffered), the burden will be distributed among many companies, and not left entirely to one, which it might crush. And when many buildings are so nearly connected, one with the others, as that the burning of one of them would be likely to set fire to the others, it is neither customary, nor in accordance with business principles, to insure them all in one company. And this, at last, is but carrying into practical operation the economic philosophy of insurance—the helpful participation and aid of the many in sharing the loss which casualty casts on one. A loss of ten thousand dollars might bankrupt one trader, while, if it were distributed among a hundred or more, it would scarcely be felt. In theory, all the premium-payers contribute their several contingents, which collectively make up the sum to be paid. This is the *rationale* of insurance.

The Home Protection Insurance Company had its business office in Huntsville, Alabama. The Capital City Insurance Company had its habitation in Montgomery, Alabama. The former was the Huntsville agent of the latter. This is not uncommon. It furnishes to insurance companies the opportunity, when large insurance is sought, or when application is made for insurance of two or more buildings, or their contents, which are situated in one block, or in dangerous proximity to each other, to distribute the risk, and thus escape an individual, heavy loss, which, if it fell on one company, might be very disastrous to its business aims.

The foregoing reflections are common knowledge. We have given expression to them, because, in our opinion, they shed light on several questions which the record before us presents for our decision. They tend to explain why it was that the storehouse, the subject of insurance in this

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case, was insured in the Capital City Insurance Company; and why it was that the agent of the Home Protection Company was the agent or person through whom the insurance was obtained. The Home Protection Insurance Company, being a corporation, could not act as the agent of the Capital City Company, otherwise than through its officers or agents. Corporations can not act in any other way.

Caldwell Brothers were merchants, having their place of business in Scottsboro, Alabama, not far from Huntsville. Stuart, a resident of Scottsboro, was the agent at that place of the Home Protection Insurance Company. The Capital City Company had no agent at that place. The Home Protection was the Capital City's agent at Huntsville. Caldwell Brothers had obtained insurance on their stock of merchandise, and they made application to Stuart for insurance on the storehouse. We have no doubt that the preparation of the written application was largely participated in by him. Such is the usual custom. The merchandise insured in the Home Protection, being in the storehouse on which the insurance was sought, the burning of either would be apt to involve the destruction of the other. Hence the reasonable desire that two risks should be assumed by different companies, in order that, if loss ensued, it should not fall entirely on one company. We think we are in safe bounds when we suppose that when Caldwell Brothers applied to Stuart for insurance on the storehouse, the latter preferred the risk should be assumed by the Capital City Company, rather than that the double loss should fall on one company, in case of its destruction by fire; and that it was at his instance the policy was taken in the Capital City Company. The circumstances of this case furnish ample evidence from which the jury could infer that Stuart was the authorized agent of the Capital City Insurance Company, in receiving and forwarding the application. And if there were doubt of this, the conduct of the Capital City through its agents, after the fire, furnishes circumstances tending to show a ratification of the issue of the policy in this case. These, however, were questions for the jury. There was no error in receiving testimony of Stuart's agency in receiving and forwarding the application for insurance in this case, nor of any other act done by him, bearing on the merits of the present controversy.

When the application was made for insurance in this case, the general questions were propounded, and answered by one of the Caldwell Brothers. One question propounded was, "Have you fee-simple title?" The answer was, "Yes."

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One clause of the application is in the following language: "Said answers are considered the basis on which insurance is to be effected, and the same is understood as incorporated in, and forming a part and parcel of the policy, as well as the warranty of this applicant." A question was raised on the trial as to the title held by Caldwell Brothers in the lot on which the storehouse stood, and as to the manner of proving that title.

The complaint filed by plaintiffs consists of a single count, which is a substantial copy of Form 13 of the Code, p. 792. The case was tried on issues raised by four pleas. The first plea is a general denial of the averments of the complaint. The others are special pleas, but neither of them specially raises the question of title. One of the plaintiffs, while on the witness stand, was asked as to the ownership of, and title to the lot on which the storehouse stood. He testified that the building belonged to himself and brother—Caldwell Brothers. In the cross-examination the following questions were asked, and answers given: Q. "You and your brother owned it?" (this storehouse.) A. "Yes. Snodgrass and I built it, and then my brother took his place." Q. "Did you do it in writing?" A. "No." Q. "From whom did you buy the lot?" A. "A man named Hugh Bynum." Q. "Did he make you and Snodgrass a deed for it?" A. "I dont remember. I gave him a horse for the lot. Snodgrass sold his interest to my brother George." Q. "Was that contract in writing between Snodgrass and G. B. Caldwell?" A. "I am not certain. I think it was." Q. "Have you the paper with you?" A. "No." Q. "Where is it?" A. "I reckon it is at home, or destroyed." Q. "What is your best recollection about it?" A. "I know that when we traded for the accounts, there was a written contract between Snodgrass and myself, but as to the lot, I dont remember whether there was or not." Q. "If there was any deed made, you do not know it?" A. "So far as the house and lot were concerned, I could not say whether there was a scratch of the pen."

The foregoing is substantially all the evidence bearing on the question of ownership in, or title to the lot on which the storehouse stood. The defendant corporation asked charges based on the question of title. One of them is in the following language: "It is not shown in this case that the plaintiffs had the fee-simple title to said property so insured; and for this reason they can not recover in this case, and the verdict of the jury must be for the defendant." There was an exception reserved to the refusal to give this

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charge. There had also been objection and exception to Caldwell's testimony, that the building belonged to himself and brother.

In a suit at law founded directly on land-ownership, nothing less than what the law calls a legal title will sustain the action. Either a paper title, ten years adverse enjoyment, or something equivalent, must be shown. But this suit does not bring the title to the property directly in issue. It is not necessary that the complaint shall aver a title. That question comes up collaterally and defensively. Ownership is a material factor in assuming insurance risk on improved real estate, but not because the evidence of the ownership is considered. The extent of the ownership is the important element of inquiry. This, because the law, voicing common experience, presumes that the absolute owner of property will be more watchful of its preservation, than would a mere tenant, or one owning only a partial interest. And this watchfulness would be scaled, not by the form of the title, but by the extent of ownership. One owning a perfect equity in improved real estate would feel the same solicitude in preserving it, as he would feel if he held the legal fee.

In *Phoenix Insurance Co. v. Browder*, 67 Miss. 620—s. c., 19 Amer. St. Rep. 326—the defense attempted was the same as that relied on in this case. True, there was some writing in that case, but it fell short of creating an estate in fee simple. The court said: "What is meant by the words 'absolute fee-simple title' in this connection? It can only mean that the assured did not have a limited interest in the property, but that he claimed and held under a deed of conveyance, or other evidence of title, purporting to invest them with an estate in fee simple. It can only mean that the assured held under a paper title conferring on them this sort of estate, as contradistinguished from any limited and inferior one. The reason for this distinction is obvious. The insurer will not deal with, nor take the great risk of indemnifying against loss and damage, a mere tenant, lease-holder, or other person claiming and having only some qualified interest in the property; but this contract for indemnity will be made only with the person having the title—the beneficial owner—the person having the absolute, *i. e.*, the vested, as opposed to the contingent or conditional title."

True, in the case from which we have quoted, there was some sort of paper title, but it did not convey the fee. It did not come up to the letter of the representation made in Vol. 95.

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the application. It would not have supported an action of ejectment for the property. But we can not suppose that the court rested, or intended to rest its judgment, on the fact that there was a paper. The true ground of the decision is expressed in the declaration by the court, that "It [the assertion that the assured had a fee-simple title] can only mean that the assured did not have a limited interest in the property." We fully approve the following language of the Mississippi court, found in the opinion from which we have been extracting: "By the insertion of those words [fee-simple title] in the condition of its policies, can it be successfully maintained that the insurance company meant that every loss occurring under its policies, in which the assured should be unable to show a title indefeasible and good against the world—a title free from every defect, real or seeming, and on which not the smallest cloud rested—should be borne by the assured? To tolerate such an opinion would be equivalent to holding that the company had deliberately set a trap to ensnare the simple-minded and unwary. . . . We can not believe that any honestly directed and fair-dealing company will deliberately undertake the management of its business on such basis."

In the case before us, we can not know what the true state of the title was. The pleadings had given no notice that any question would be raised on the title to the lot on which the storehouse stood. The main issue raised by the pleadings was, whether the storehouse had been destroyed by fire, in such manner as to fix a liability on the insurance company therefor. As we have said, the extent of ownership held by the assured in the building was the material inquiry, because such interest stimulates solicitude and watchfulness in its preservation. The interest, not the evidence of it, is the stimulus. We find no error in the rulings of the court on the question of the ownership of the property, or the testimony by which it was established.

Questions were raised on the sufficiency of the proofs of loss. We are not informed precisely what the proofs were. After they were furnished, the adjuster visited the premises, and made and submitted an estimate of the cost of rebuilding. It is not pretended that, either at that time or before, he made any objection for the want of timely notice of the loss, or that he complained of the insufficiency of the preliminary proofs, except on a single ground, which we think was untenable. The main objection he urged, when he visited the place, had reference to the counters and shelving, to be considered further on. This, under all the

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authorities, must be regarded as a waiver alike of notice of loss, and of the insufficiency of the preliminary proof.—*Fire Ins. Co. v. Felrath*, 77 Ala. 194; *Badger v. Glenn Falls Ins. Co.*, 49 Wis. 389; 7 Amer. & Eng. Encyc. of Law, 1054; 11 *Ib.* 341; *Central City Ins. Co. v. Oates*, 86 Ala. 558-68-9; *Com. Fire Ins. Co. v. Allen*, 80 Ala. 571.

The claim for the counters and shelving, testified to have been burned with the building, presents the only remaining question we need consider. The testimony is that they were framed and built with the building, and were not movable fixtures. They were not named separately, and were not insured, unless they constituted a part of the storehouse. The primary meaning of the word *fixture* is, "that which is fixed or attached to something as a permanent appendage." In law it takes a wider range. Anything fixed or attached to a building, and used in connection with it, is a fixture, whether it be a permanent appendage or not. Hence, in legal jurisprudence, there are movable fixtures and immovable fixtures. Whenever the appendage is of such a nature that it is not part and parcel of the building, but may be removed without injury to the building, then it is a movable fixture, and is a chattel. It is no part of the realty, and does not pass with a conveyance of the freehold. If, however, it be so connected with the building as that it can not be severed from it without injury to the building—a disturbance of its rounded completeness—then it is part of the realty, and it passes with the conveyance of the soil. Of course, these principles apply only when there is no agreement of parties varying these legal intendments.—8 Amer. & Eng. Encyc. of Law, 43, 61; Rapelje & L. Law Dictionary; *O'Brien v. Kusterer*, 27 Mich. 289; *Tillman v. DeLacey*, 80 Ala. 103, and authorities cited. It is manifest that, in this case, if the only testimony on the question be believed, a conveyance of the freehold would have carried with it the counters and shelves.

The insurance company had a printed form of application for insurance. The one made and used in this case has been sent up for our inspection. It contains many questions to applicants, so framed as to suit the various kinds of property, of which insurance against loss by fire is sought and obtained. The applicant is required to answer such of the questions as are applicable to the insurance risk he seeks. In this instance, the applicants sought insurance on a store building, which they valued at \$2,300. The insurance obtained was \$1,500. This is the only item of property to which any answer was made, although the form contained a
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blank for "counters, shelves and drawers." Neither the policy nor the conditions annexed to it make any reference to these fixtures, but a pen-dash indicates that that question, together with many others, was regarded as immaterial. We hold the proper inquiry for the jury was, whether the counters and shelves were movable or immovable fixtures. If the former, they were not insured. If the latter, they were part of the storehouse, and were covered by the policy.

We need not apply these principles to the charge given, nor to the various charges refused. In none of its rulings did the Circuit Court err.

Affirmed.

WALKER, J., not sitting, having been of counsel.

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Bill in Equity for Foreclosure of Mortgage, and to Declare Priority of Liens; Cross-Bills.

1. *Recital in note that it was given for purchase-money of land.*—When a promissory note was in fact given for money borrowed to make a cash payment on a purchase of land, a vendor's lien is not created by a recital therein that it was given for the purchase-money of the land.

2. *Unrecorded mortgage; validity as against subsequent mortgages, purchasers, and judgment-creditors*—Under statutory provisions (Code, §§ 1810-11), a mortgage of real estate, given to secure an antecedent debt, is inoperative and void as against subsequent purchasers for value, mortgagees, and judgment-creditors, without notice, unless recorded before the accrual of their respective rights; and the fact that it is filed for record at the same time with a subsequent mortgage, does not give it any preference over the latter.

3. *Same; proof of notice.*—When the holder of a prior unrecorded mortgage seeks to foreclose and enforce his lien against subsequent mortgagees, the *onus* is on him to prove that they had notice of it, actual or constructive, before their rights accrued; and if the second mortgage was given to secure three separate and independent debts, due to three different persons, the fact that one of them had knowledge of the prior mortgage does not charge the others with constructive notice of it.

APPEAL from the City Court of Birmingham, in equity.

Heard before the Hon. H. A. SHARPE.

The original bill in this case was filed on the 6th of September, 1889, by Steiner Bros., suing as partners, against

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A. A. Clisby, Lorenzo Clisby and wife, Robert Jamison, and W. R. Deloach; and sought to foreclose a mortgage on certain real estate in Birmingham, and to declare and enforce the complainant's equitable rights in and to the property, as paramount and superior to the rights asserted by A. A. Clisby, Jamison, and Deloach. The mortgage, a copy of which was made an exhibit to the bill, was dated July 23d, 1888, and was executed by said L. Clisby to A. A. Clisby, to secure the payment of a promissory note for \$5,000, which was dated April 25th, 1887, payable one day after date, at the First National Bank of Birmingham, to the order of A. A. Clisby, and recited that it was given for the purchase-money of the lots described in the mortgage. This note and mortgage were transferred and assigned by A. A. Clisby, February 19th, 1889, on the recited consideration of \$5,000 in hand paid, to M. L. & C. Ernst, who, on the 4th September, 1889, for value received as recited, transferred the same to complainants. The complainants sought to foreclose the mortgage as assignees, and also seem to have asserted a vendor's lien on the land for purchase-money unpaid, under the facts stated in the opinion of the court. Jamison, Deloach and A. A. Clisby each asserted liens on the land under another mortgage, executed to them by said L. Clisby, which was given to secure the payment of his three notes, one payable to each of them respectively; which mortgage was dated September 26th, 1888. Jamison claimed a priority over the complainants, and asserted his rights by cross-bill, as well as in his answer to the original bill; while Deloach asserted his in his answer to the original bill, and also in his answer to Jamison's cross-bill, and claimed at least equal preference with Jamison over complainants. The facts out of which these several claims and liens arose are fully stated in the opinion of the court, and it is unnecessary to repeat them. On final hearing, on pleadings and proof, the City Court ordered the mortgaged property to be sold, and directed that the proceeds of sale, after payment of costs, be first applied to the claims of Jamison and Deloach, and secondly to the claim of Steiner Bros. The complainants appeal from this decree, and here assign it as error.

WHITE & HOWZE, and WATTS & SON, for appellants.

JNO. S. JEMISON, and W. R. HOUGHTON, *contra*.

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CLOPTON, J.—On November 15, 1886, the Birmingham Land & Loan Company sold to Deloach and Cobbs the land in the bill mentioned, for eleven thousand dollars, one third of which was paid in cash, and notes for the deferred payments executed by them; the company giving a bond conditioned to make title on payment of the purchase-money. On January 20, 1887, Deloach and Cobbs sold the land to Cheatham and L. Clisby, for fifteen thousand dollars, one third to be paid in cash, the balance in one and two years, with interest. By arrangement between the parties, Cheatham and Clisby gave two notes to the Birmingham Land & Loan Company, for the amount of the purchase-money, with interest, owing by Deloach and Cobbs, and notes to Deloach and Cobbs respectively, for the excess of the fifteen thousand dollars agreed to be paid by them. Deloach and Cobbs surrendered to the company the bond for title held by them, and the company executed to them a bond conditioned to make title to them. In order to make the cash payment, L. Clisby borrowed from A. A. Clisby five thousand dollars, for which he gave his note dated April 25, 1887, payable one year after date, at the First National Bank of Birmingham. To secure this note, and in consideration of the extension of payment for twelve months, L. Clisby signed and delivered to A. A. Clisby a mortgage on the land. This mortgage, which bears date July 23, 1888, was not, at the time of delivery, attested or acknowledged, as required by statute. In consequence thereof, it was returned to L. Clisby, and acknowledged by him before a justice of peace, who appended thereto his official certificate of acknowledgment, September 28, 1888, and then returned it to A. A. Clisby. Cheatham transferred his interest to L. Clisby, in consideration of his assuming to pay the notes given by them for the purchase-money.

Jemison, having purchased from the Birmingham Land & Loan Company the notes of Cheatham and Clisby, and A. A. Clisby having acquired the note given to Cobbs, by agreement of all the parties L. Clisby executed to Jemison, Deloach and A. A. Clisby, respectively, notes in substitution and renewal of the notes of Cheatham and Clisby held by them; and to secure the same, and in consideration of the extension of the indebtedness, executed a mortgage on the land, at which time the Birmingham Land & Loan Company executed to L. Clisby a deed to the property. Though the notes, mortgage and deed bear date September 26, 1888, they were not in fact delivered until the 9th day of October. On October 11, 1888, A. A. Clisby filed the

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mortgage of L. Clisby to him, and the mortgage to Jemison, Deloach and Clisby, in the office of the judge of probate of Jefferson county for registration. On February 18, 1889, A. A. Clisby transferred, and assigned without recourse for value, the note for five thousand dollars, and the mortgage to secure the same, to M. L. and C. Ernst, who transferred and assigned them thereafter to Steiner Bros. For the foreclosure of this mortgage, Steiner Bros. filed the present bill. L. Clisby, Deloach and A. A. Clisby and Jemison are made defendants. Jemison and Deloach filed separate cross-bills.

Though the note for five thousand dollars recites that it was given for the purchase-money of the land, this is untrue; it was given for money borrowed to make the cash payment for the land; the recital does not create a lien on the land. Whether, by the transaction of September 26, 1888, Jemison and Deloach waived or abandoned the vendor's lien, or whether complainants had notice of such lien,—questions elaborately discussed by counsel,—it is unnecessary, in the view we take of the case, to decide. The inquiry is, which mortgage has priority of lien? We shall consider the question of the superiority of lien as if the mortgage under which complainants claim was legally executed on the day it bears date, and the mortgage under which Jemison and Deloach claim was not executed until October 9, 1888.

Section 1811 of the Code declares, that all conveyances of real property, mortgages, or deeds of trust to secure any debt, other than a debt created at the date thereof, are inoperative and void as to purchasers for a valuable consideration, mortgagees, and judgment-creditors, without notice, unless the same have been recorded before the accrual of the right of such purchasers, mortgagees and judgment-creditors. The statute, the purpose of which is the prevention of fraud, is imperative in its terms. The right of Jemison and Deloach accrued October 9, 1888; the prior mortgage was not recorded until the 11th day of October, two days thereafter. At the time of the accrual of their right, the prior mortgage was inoperative and void as to them, unless they had notice thereof.—*Wood v. Lake*, 62 Ala. 489. The fact that both mortgages were filed for record at the same time, does not change the effect of the statute of registration. It does not require the second mortgage to be recorded before the first is recorded, in order to preserve its preference. It simply declares the unrecorded prior mortgage inoperative and void as against

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the subsequent mortgagees, when their mortgage is executed and received without notice of the first.—*Coster v. Bank of Georgia*, 24 Ala. 37. Neither does the fact that A. A. Clisby, one of the mortgagees in the second mortgage, knew of their prior mortgage, affect the rights of Jemison and Deloach. Their debts are separate and distinct—there is no community of interest in respect to them. The mere circumstance that the mortgage was executed to all three does not create a mutual agency, so that notice to one will affect the others.—*Snyder v. Sponable*, 1 Hill, 567; Wade on Notice, § 684

Conceding that M. L. and C. Ernst and complainants had no notice of the mortgage to Jemison, Deloach and Clisby, at the time they respectively purchased the first mortgage, the absence of such notice does not impart validity and superiority, as against the subsequent mortgagees, to the prior mortgage, which is declared by the statute to be inoperative and void at the time they purchased it. On the undisputed facts, Jemison and Deloach are mortgagees entitled to protection under the statute against the lien of the mortgage under which complainants claim, if without notice thereof. There is no pretense, no effort to show, that Deloach had notice. A. A. Clisby testifies that he *believes* he told Jemison of the mortgage before the second mortgage was delivered. But notice thereof is positively denied by Jemison, who swears that Clisby did not tell him about it until after he had transferred the mortgage to M. L. and C. Ernst. The burden of proving notice rests on complainants. We find from the evidence that neither Jemison nor Deloach had notice of the prior mortgage, nor information of facts sufficient to put them on inquiry, at the time of the accrual of their right under the second mortgage.

The decree of the City Court, in accord with these views, is affirmed.

[On application for rehearing.]

COLEMAN, J.—The application for a rehearing has been carefully examined and considered. We can not consent to the contention that the debt of complainant was created at the date of the mortgage, so as to relieve it from the operation of section 1810 of the Code. True, the debt was extended, and the extension no doubt, as has been frequently held, constituted a valuable consideration. But the statute (sec. 1810) is imperative, and declares that . . . “mortgages, or instruments in the nature of a mortgage of real

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property, to secure any debt created at the date thereof, are void as to purchasers for a valuable consideration, mortgagees and judgment-creditors, having no notice thereof, unless recorded within thirty days from their date"; and section 1811 provides, "that all other conveyances, mortgages" &c., "to secure any debts other than those specified in the preceding section" [debt created at the date thereof], are inoperative and void, as to purchasers for a valuable consideration, mortgagees and judgment creditors, without notice, unless the same have been recorded before the accrual of the right of such purchasers, mortgagees, or judgment-creditors." The evidence shows that complainants' debt began in a loan of money, several months before the date of execution of the mortgage to secure it, and was not created at the date of the mortgage, but only extended at that time.

Complainant's own contention is, and the evidence sustains him in this respect, that Jamison was a subsequent mortgagee; and if he had no notice of the existence of complainant's mortgage, the prior mortgage not having been recorded in time, under section 1811 was inoperative against him. There is some foundation for the argument that Jamison had notice from Clisby of complainant's prior mortgage, but the facts are not sufficient to overcome the positive proof to the contrary.

The rehearing must be denied.

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Contested Claim of Homestead Exemption.

1. *House and lot as homestead; how determined.*—Whether or not a house and lot in an incorporated town can constitute an exempt homestead, is to be determined by the character of the building, the uses to which it is adapted, and to which it has been devoted, and not by the intention or purpose of the owner in building it; and where the house, as here, is a building 40 feet by 20, divided by partitions into two rooms, the larger one being fitted up with shelves and used as a bar-room, first by the owner and then by his lessee, it can not be claimed as a homestead because the smaller room, about 14 by 16 feet in size, was used by him as a bed-room, while taking his meals elsewhere in town, and was not leased with the residue of the premises, though the lessee was allowed to sleep in it.

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APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. J. R. DOWDELL.

The appellants in this case having obtained a judgment on the 17th September, 1890, against L. D. Jones, an execution thereon was levied by the sheriff, October 8th, 1890, as shown by his return, "on one business house and lot in the town of Camp Hill, known as the 'L. D. Jones Bar-room', bounded as follows," &c. The defendant interposed a claim of exemption to the house and lot as his homestead, describing it as "one storehouse and lot in the town of Camp Hill, known as the 'L. D. Jones Bar-room,' bounded as follows"; and his claim was contested by the plaintiff. On the trial of the issue joined between the parties, it was shown that the value of the property was less than \$1,000; and the other evidence is thus stated in the bill of exceptions:

"The defendant himself, and G. W. Dawson, R. R. Spinks and others, in his behalf, testified substantially, that said house and lot was situated in the town of Camp Hill, the house being about 40 feet from the track of the C. & W. Railway Company, and 25 or 30 yards from the depot, being in the immediate locality of other business houses in said town, and without any inclosure around the building, or other obstructions to approach thereto; that said house is about forty feet in length, extending north and south parallel with the railroad track, and about twenty feet in width; that it was built by said Jones in 1887, to be used as his home and residence, and for a business house, and was so used and occupied; that on the north and south ends, and also on the east side, on the outside of the building, were imprinted in large letters the words, '*L. D. Jones, dealer in liquors, fine wines, &c.*,' together with drawings representing a barrel, jug, decanter, &c.; that there is a door in the east side of said house, and another in the north end thereof; that said house is divided by partition walls into two rooms, one of which, as said Jones testified, is about fourteen feet wide by sixteen feet long, in the south-west corner of the building, from which a door opens into the other room, and used as a common passway between the two rooms; that in the year 1890, and at the time of said levy, as well as at the time of the trial, the front room of the house, in which were the bar-fixtures of said Jones, was rented and occupied by one Landrum as a liquor-saloon, the back room being reserved and occupied by said Jones as his home, but was also used by said Landrum as a bed-room in conjunction with said Jones, and by his permission, but not under the

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contract of rent; that said Jones, who is an unmarried man, kept his bed, his trunk, gun, wardrobe, and all his household goods in said room, and occupied the same as his place of residence, but ate his meals at the residence of the witness Dawson, who resided on a different lot in said town; and that said defendant had no other place of residence. It was shown, also, that each of said rooms was provided with a fire-place by means of a stack chimney between them; that the larger room was provided with a counter, screen, decanters, barrels &c., and otherwise appointed for saloon purposes; and that there was a door in the south end of the building, entering the room occupied by said Jones. This being all the evidence, the court charged the jury, on request, that they must find for the defendant, if they believed the evidence." The plaintiffs excepted to this charge, and they here assign it as error.

H. J. GILLAM, for appellants, cited *Blum v. Carter*, 63 Ala. 235; *McConnaghy v. Baxter*, 55 Ala. 381; 9 Amer. & Eng. Encyc. Law, 428, note 9.

W. D. BULGER, *contra*, cited *Pryor v. Stone*, 19 Texas, 371; *Ockley v. Chamberlain*, 76 Amer. Dec. 516; 70 Amer. Dec. 341.

McCLELLAN, J.—Whether the house and lot involved in this case constitutes the homestead of the defendant Jones, depends upon the character of the building, and the uses to which it is adapted and to which it was devoted. The purposes for which it was erected by Jones, the fact that it was built by him "to be used as his home and residence, and for a business house," can exert no influence in determining whether it was "a home and residence" now that it has for long been a completed structure and subjected to whatever occupancy was originally contemplated by the claimant. Its *status*, as being a homestead or not, must be adjudged by what he did—by the character of house he built, and the uses to which he in fact devoted it—and not by what he intended to do. Moreover, the fact that he built it for a home and residence can not be proved by evidence of his mere purpose to subserve that end, but can only be found inferentially from his visible acts in the premises; and his testimony that such was his purpose must be taken to mean only that he intended to build such a home and residence as he did in fact build. And however his mind may have been imbued with the idea that he was pro-

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posing a home for himself, it will not be held to be a homestead, unless, dissociated from his own purposes, the house and lot in question fills the definition of a homestead under our laws. The evidence of his intentions found in this record must, therefore, be wholly disregarded; and the inquiry must proceed with reference solely to the kind of house which is on the lot and the nature of its occupation by Jones; it being admitted that, as to location, area and value, the house and lot is within the exemption secured to Jones against the claim which the plaintiffs seek to enforce upon it.

The house is in the business portion of the town of Camp Hill. It is not inclosed as residences in towns of this class usually are. Its dimensions are about forty by twenty feet. It is divided by partition walls into two rooms, one of which is in a corner of the building and is about sixteen by fourteen feet. The other and larger room covers the remainder of the building, and this is filled up with counters, &c., as for a business house. Between these rooms there is a door leading from one to the other. Each room has a fireplace served by a stack-chimney constituting a part of the partition between them. Such was the character of the house—essentially an ordinary business house, with the usual smaller room at the back of it.

Now, as to the uses to which it was put. When the building was completed, about 1887, Jones carried on the business of a retail liquor-dealer in the front room, and had an illustrated sign painted on the outside of the building proclaiming his business. In 1890, and thence up to the time of the levy and trial, Jones rented the front room with its bar-fixtures, &c., to one Landrum, who continued the liquor business therein. In 1887, Jones, who is an unmarried man, fitted up the back room as a bed-room, and has continued to occupy it as such ever since. This room was not let to Landrum along with the other, but since he has been Jones' tenant of the main room he has, by permission of the latter, also slept in the back room. Jones does not, and never has taken his meals in this bed-room, or in the house, but boarded at the house of one Dawson situated in another part of the town.

On these facts, there can be no doubt that the primary adaptation of the building is to the purposes of business, and that its principal uses are, and have always been, the uses of trade, and not those of domiciliary occupation. The authorities are by no means uniform as to what will or will not be considered a homestead, when the building

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claimed as such is in part adapted and devoted to business pursuits, and in other part used as a dwelling; but we think it may be laid down as a safe and conservative rule on that subject, that where the trade adaptation and use of a building is incidental or secondary only to its habitation as a dwelling—where the chief use of the structure is that of a home for the owner, and some part only not essential to this end is fitted up and used as a shop, an office or sales-room—it is a homestead; but, when this state of facts is reversed, and the residence feature is only auxiliary to the business use—where only a relatively small part of the building is devoted to the uses of habitation, and the chief adaptation and use are those of business—the building is not a homestead, even though the occupant have no other home, and uses this for all the purposes of living. Illustrations will readily suggest themselves. For instance, the owner of an hotel, erected for and adapted to the purposes of public entertainment, would not have homestead therein though he resides there with his family; but the owner and occupant of a private house would not be deprived of the exemption through the fact that he rented rooms to lodgers and entertained them, or even travellers, at table for a consideration. A professional man would not lose the exemption by reason of devoting some part of his dwelling to the uses of his profession; but if a physician, for instance, should make a public infirmary of his residence, and continue to live there merely as an incident to the conduct of the hospital, we apprehend homestead would be lost.—*Ackley v. Chamberlain*, 16 Cal. 181; *Luzell v. Luzell*, 8 Allen, 575; *Mercier v. Chase*, 11 Allen, 194; *Goldman v. Clark*, 1 Nev. 607; *Harriman v. Ins. Co.*, 49 Wis. 71; *Laughlin v. Wright*, 63 Cal. 113; *Pryor v. Stone*, 70 Am. Dec. 341, and notes, 348 *et seq.*

Guided by this rule, our conclusion would be against the defendant's right of homestead, even if he had used the house in question for all the purposes of residence. *A fortiori*, must that conclusion be reached in view of the fact that the only occupation of the premises by the defendant consisted in the fact that he with another, there by his license, used a small back room of this storehouse as a bed-room, and kept his personal effects there, while he ate at another place situated in a distant part of the town. The case presented, in view of this fact, is the usual one of occupation of the back room of a storehouse for sleeping purposes only; and it would be anomalous to a degree to hold that to be the residence—the home—of the occupant, which is saved to him by our homestead laws.

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This precise point has been ruled by the Supreme Court of Texas; and we can not do better than close this opinion by quoting the language there employed: "We think that the facts in the present case show that the premises in controversy in this suit did not constitute the homestead of the appellee. He used the premises for business purposes, and slept in one of the rooms of the house, but at the same time took his meals habitually at another place. A man's homestead must be his place of residence; the place where he usually sleeps and eats; where he surrounds himself with the ordinary insignia of home, and where he may enjoy its immunities and privacy. We do not think that the facts in this case show that the appellee used the premises as a homestead at the time of the sale under execution."—*Phileo v. Smalley*, 23 Texas, 498.

The Circuit Court erred in giving the affirmative charge for the defendant; and its judgment must be reversed. The cause is remanded.

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Action on Common Counts, for Goods Sold and Delivered

1. *Articles of partnership construed.*—Under written articles of partnership signed by D. C. A. and A. D. A. only, and containing these stipulations: (1) that the capital stock of the firm shall be \$1,500; (2) that each of said partners shall pay an equal part of the necessary expenses in carrying on the business; (3) that said partners "agree and hereby promise to pay J. D. A. one-third of the net profits of said mercantile business for the use of his storehouse, trade and influence, and for the loan of \$500, and more if he thinks it advisable;" (4) "that the remaining two-thirds of the net profits shall be divided between the said partners, D. C. A. and A. D. A., share and share alike;" and (5) "that neither partner shall draw any money from the partnership funds, nor contract any debt against the firm, without the consent of the other partner;"—J. D. A. does not appear to be a partner.

2. *Liability as partner to creditors.*—A person may be liable as a partner to creditors of the partnership, although he was not a partner in fact; but, to render him so liable, it must be shown that he was held out to the public as a partner with his knowledge and consent, and that the creditor contracted with the partnership on the faith and belief that he was a partner.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. WM. E. CLARKE.

This action was brought by A. G. Levy & Co., against

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D. C. Alexander, A. D. Alexander, J. D. Alexander, and J. T. McDonald, "late partners under the name and style of D. C. Alexander & Co.;" and was commenced on the 1st February, 1888. The complaint contained two counts, the first claiming \$163.95, "due by account stated between plaintiffs and defendants on the 20th December, 1887;" and the second \$155 "due by account for goods sold and delivered by plaintiffs to defendants on the 21st August, 1886." J. D. Alexander filed a special plea, denying that he was ever a member of the firm of D. C. Alexander & Co., and issue was joined on that plea. On the trial, as the bill of exception shows, the plaintiffs introduced evidence tending to show that said J. D. Alexander was a partner in the firm under the written articles of partnership, and had been held out to the public as a partner with his knowledge and consent. It was admitted that the written articles were deposited with said J. D. Alexander at the time the partnership was formed, and that the original was lost; and said J. D. Alexander, testifying for himself, produced an alleged copy, which he said was correct in every particular, and which was in these words:

"Articles of partnership between D. C. Alexander and A. D. Alexander, in the mercantile business at Fairview, near Faunsdale, Alabama. (1.) The capital stock of said firm is to be \$1,500. (2.) The said partners agree to pay equal amounts of the necessary expenses in carrying on said business. (3.) It is further stipulated and agreed that said partnership shall continue at the pleasure of the partners. (4.) The said partners, D. C. Alexander and A. D. Alexander, agree and hereby promise to pay J. D. Alexander one-third of the net profits of said mercantile business, for the use of his storehouse, trade and influence, and for the loan of \$500, and more if he think it advisable. (5.) It is further agreed and stipulated, that the remaining two-thirds of the net profits shall be equally divided between the said partners, D. C. Alexander and A. D. Alexander, share and share alike. (6.) It is further agreed and stipulated, that neither partner shall draw any money from the partnership funds, nor contract any debt against the firm, without the consent of the other partner. (7.) It is further agreed that the firm name shall be D. C. Alexander & Co. (8.) It is further agreed and stipulated, that if any controversy arise between said partners, in relation to the partnership business of the same, it shall be settled by reference to arbitrators." (Signed by D. C. Alexander and A. D. Alexander, and attested by a witness, but without date.)

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"The plaintiffs introduced evidence tending to show that said writing, *Exhibit A*, was not a true copy of the original contract of partnership; that the original made no mention of \$500 loaned to said firm by J. D. Alexander, and he did not in fact, at any time, lend \$500 to said firm, or to the other members thereof, but contributed to said partnership one-third of the net capital stock, or \$500;" also, that the books of the firm were open to his inspection, and were frequently inspected by him; that trial balance-sheets were sent to him monthly, as to the other partners; that he sometimes ordered goods for the firm; that in the Fall of 1886 "he gave his one-third interest to said McDonald, who was his son-in-law, and who added nothing to the strength or capital of the firm, but simply took the place and the interest of said J. D.," and that afterwards, at the instance of said J. D. Alexander, the books of the firm were changed, so as to show that the \$500 entered to his credit as capital stock was a loan.

On this evidence, the court charged the jury: "The only issue in this case is, whether J. D. Alexander was a partner in the firm of D. C. Alexander & Co. at the time the claim sued on was contracted. It is conceded that the partnership was formed by a contract in writing, and that such contract is lost; and plaintiffs and defendants each have offered parol evidence of its contents. The defendant offers the paper marked *Exhibit A* as a copy of the original contract, to show that he was not a member of said firm; and I charge you that it does not make him a partner." The defendant excepted to this charge, and also to the refusal of the following charges, which were asked by him in writing: (1.) "If the jury believe from the evidence that *Exhibit A* is a true copy of the articles of partnership, then J. D. Alexander was a co-partner in said firm of D. C. Alexander & Co." (2.) "If the evidence shows that J. D. Alexander was, with knowledge and consent, held forth to the public as a partner in the firm of D. C. Alexander & Co., then he may be charged as a partner with the plaintiffs' debt."

The charge given, and the refusal of the charges asked, are the only matters assigned as error.

GEO. B. JOHNSTON, for appellants.—(1.) J. D. Alexander was a partner in fact of the firm of D. C. Alexander & Co., even if *Exhibit A* be held a true copy of the articles of partnership, and certainly under the oral evidence adduced. *Emanuel v. Draughn*, 14 Ala. 303; *Moore v. Smith*, 19 Ala. 774; *Howze v. Patterson*, 53 Ala. 205; *Couch v. Woodruff*,

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63 Ala. 466; *McDonnell v. Battle House Co.*, 67 Ala. 90; *Tayloe v. Bush*, 75 Ala. 432; 2 W. Bla. 998; Coll. Partnership, 44; *Scott v. Campbell*, 30 Ala. 728; *Meaher v. Cox, Brainard & Co.*, 37 Ala. 201; 45 N. Y. 797, or 6 Amer. Rep. 177. When one lends money to a partnership, agreeing to receive a share of the net profits of the business as compensation for it, he becomes liable as a partner to creditors of the firm.—*Parker v. Canfield*, 37 Conn. 250, or 9 Amer. Rep. 317; *Loomis v. Marshall*, 12 Conn. 69; 53 Wisc. 260, or 40 Amer. Rep. 770; 58 N. Y. 272, or 17 Amer. Rep. 244; 17 Wisc. 140; 20 Wisc. 117; 42 Wisc. 85; *McGovern v. Madison*, N. Y., 22 N. E. Rep. 398; *Hackett v. Stanley*, N. Y., 22 *Ib.* 245. (2.) Although J. D. Alexander may not have been a partner in fact, he rendered himself liable as a partner to creditors of the firm.—*McDonnell v. Battle House Co.*, 67 Ala. 91; *Bush v. Tayloe*, 75 Ala. 432.

JNO. C. ANDERSON, J. W. BUSH, GEO. W. TAYLOR, and PITTS & HARWOOD, *contra*.—(1.) The written articles of partnership, shown by *Exhibit A*, were signed only by D. C. and A. D. Alexander, and show no interest or liability on the part of J. D. Alexander as a partner.—*Bates on Partnership*, § 17; *Tayloe v. Bush*, 75 Ala. 436. (2.) J. D. Alexander was not liable to plaintiffs as a partner, unless they contracted with the firm in the belief, induced by his conduct, that he was a partner.—85 Ala. 19; 86 Ala. 305.

COLEMAN, J.—If J. D. Alexander was a party to the instrument offered in evidence, the argument of appellant to show that its terms are of such a character as to constitute him a partner in favor of creditors would be in point, and entitled to consideration. The construction of this instrument by the court did not exclude from the jury the consideration of other evidence, which tended to show that J. D. Alexander was a member of the firm of D. C. Alexander & Co. Neither was there any error in the charge of the court which construed and declared the legal effect of the instrument offered in evidence as a copy of the original copartnership agreement. The testimony without dispute showed that the copartnership agreement was in writing, and that the original had been lost. The testimony of the defendant tended to show that exhibit "A" was a true copy of the original agreement, and the testimony of the plaintiffs tended to show that it was not, and that it had other provisions. The charge of the court was simply to the effect, that "Exhibit A," of itself, did not constitute J. D. Vol. 85.

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Alexander a partner. Of the correctionness of this charge there can be no doubt. Standing by itself, and construed alone, that agreement was no more binding upon J. D. Alexander, than it was upon his counsel. As to him, it was strictly *res inter alios acta*; and if there was no other understanding to bind J. D. Alexander as a partner, it could not be said in any sense that he was, *inter sese*, a partner. The first charge requested by plaintiff was properly refused.

Where one permits himself to be held out as a partner, and persons contract with the firm upon the supposed fact that he is a partner, he makes himself liable as such, whether in fact he be a partner or not; but, if the evidence shows that credit was given to the partnership in ignorance of this fact, and not upon the supposition or faith that he was a partner, then no such liability arises.—*Ala. Fer. Co. v. Reynolds*, 85 Ala. 23. The second charge asked by appellants, and refused by the court, is erroneous for two reasons. *First*, it seeks to fasten a liability upon J. D. Alexander, if he was held out to the public as a partner, whether it was done with *his* knowledge and consent, or without it. It must be done with his knowledge and consent, to render him liable. *Second*, because there is no evidence in the record to show that plaintiffs debt was contracted upon the faith that he was a partner, or that such information was ever conveyed to plaintiffs until after their debt was contracted. We have seen that the credit must be given upon the faith that he was a partner.

There is no error in the record. Affirmed.

Ala. Mineral Land Co. v. County Commissioners of Perry.

Contested Assessment of Lands for Taxation.

1. *Evidence as to value of lands assessed for taxation.*—In fixing the taxable value of land, the owner's return to the assessor being controverted, it may be proper, perhaps, to receive evidence of the value of other lands in the neighborhood similarly situated, as being a feature of its surroundings; but the valuation of those lands as found upon the tax-books, whether made by the owner, the tax-assessor, or the Commissioners Court, is not admissible as evidence for any purpose.

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APPEAL from the Circuit Court of Perry.

Tried before the Hon. JOHN MOORE.

JOHN M. McKLEBOY, for appellant.

J. H. STEWART, *contra*.

WALKER, J.—The appellant was notified that objection was made to its return of its property in Perry county for taxation, on the ground of the undervaluation of its lands. It appeared at the August (1890) term of the Commissioners Court of that county, and contested the objections. The Commissioners Court raised the valuation from \$1.25 per acre to \$3.00 per acre, and the lands were assessed accordingly. The cause was tried anew in the Circuit Court, an appeal having been taken pursuant to the provision of section 13 of the act approved February 28, 1887.—Acts of Ala. 1886-87, p. 11. The valuation as made by the Commissioners Court was confirmed by the judgment of the Circuit Court. This appeal is from that judgment, and the errors assigned are upon rulings of the Circuit Court in rejecting evidence offered by the appellant.

The appellant offered to prove, 1st, by the agent of the Selma Land & Improvement Company, that that company owned a considerable quantity of land in said county, of a similar character to the lands owned by the appellant, and that said lands were in the same part of the county as are appellant's lands, and that said lands were listed for assessment for State and county taxes for the year 1890 at one dollar and twenty-five cents per acre; and 2d, by the tax-assessor of said county, that after the return of said Selma Land & Improvement Company had been made, the Commissioners Court duly reviewed said assessment, and on such review placed the valuation of the lands of said company at two dollars per acre. The record does not show that any exception was reserved to the action of the court in refusing to admit other evidence which was offered by the appellant.

In hearing objections to assessments, the Commissioners Court "shall receive only evidence touching the fair market or real value of the property, and shall take into consideration its character, whether improved or not, its surroundings, and, if it is productive, the amount of its average annual yield;" it being the true intent and purpose of the statutory provisions on the subjects, as therein expressed, "to have all property and subjects of taxation fairly

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assessed at the value which would be realized therefrom by a cash sale, but not a forced sale thereof, in such manner as such property and subjects are usually sold; and for this purpose the power and authority hereby conferred upon such court (County Commissioners) shall be liberally construed, but said court is expressly prohibited from reducing the valuation of any property below the fair cash market value of the property, or what the property would sell for."—Acts of Ala. 1886-7, pp. 11, 12; *State v. Bienville Water Supply Co.*, 89 Ala. 325. In fixing the taxable value of lands, it would perhaps be proper to receive evidence of the value of similar property under similar conditions, as a feature of the "surroundings" within the meaning of that expression as used in the statute, and as affording a criterion from which the value of the property in question could be deduced—*Johnson v. West*, 43 Ala. 689; 7 Am. & Eng. Ency. of Law, 60. The assumption that such proof would be admissible brings us to the question raised by the assignments of error in this case, as to whether the valuations at which such other lands have been returned or assessed for taxation would be competent as evidence of their real value. The valuation of property as found upon the tax-books represents either the *ex-parte* statement of the owner thereof in his return, or the conclusion of the assessor or of the Commissioners Court from information, inspection or otherwise. The declaration of the owner would not be admissible against any person other than himself or some one in privity with him. The decision of the assessor, or of the Commissioners Court, would not be admissible against a stranger to the proceeding in which the decision was rendered. Such stranger, in offering proof of such valuation of the property of others, claims the benefit of evidence which would not be available against him. A valuation of his own property, in which he does not participate, is inadmissible, if objected to by him.—*Birmingham Mineral R. R. Co. v. Smith*, 89 Ala. 305. It is not permissible to prove a fact pertinent to the issue in a case by showing that some one not a party to the suit has made an oral or written statement in reference to such fact, or by producing evidence of the conclusion reached in another proceeding which involved the same question but was between parties who are strangers to the pending suit. The returns of the owners and the valuations as made on a review of the assessments are equally incompetent as evidence of the value of lands belonging to other persons. The inquiry as to what was the fair cash market value of

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the lands of the appellant should be determined upon evidence pertinent to that question. It would but tend to draw away the minds of the jury from the matter in issue to admit evidence to show the results of similar inquiries as to other property of like character. The question as to what conclusions were reached in other cases could have no legitimate bearing upon the result in this case. In determining the valuation at which the appellant's property should be assessed for taxation it is immaterial to inquire whether or not other property has been fairly valued, for the fact that under-valuations have been permitted in many instances would afford no excuse for the assessment of the appellant's property at less than its "fair market or real value." A neglect of the requirements of the law in this case could not be excused by showing a similar breach of duty in other cases. There may be a remedy to prevent unjust discriminations in the valuation of property for taxation, but the fact that the property of others has been undervalued could not justify a corresponding under-valuation of the property of the appellant. The foregoing considerations suffice to show that there was no error in excluding the evidence above referred to.

Affirmed.

Agnew v. Walden & Son.

Action on Promissory Note, by Payees against Administrator of Deceased Maker.

1. *Error without injury in ruling on pleadings.*—The sustaining of a demurrer to a special plea, if erroneous, is error without injury, when the record shows that the defendant had the full benefit of the same defense under other pleas, on which issue was joined.

2. *Non-claim; description of claim on filing.*—To avoid the statute of non-claim, when pleaded to an action on a promissory note (Code, § 2083), it is not necessary to show that the note itself, or a copy of it, was filed in the office of the probate judge, when it appears that the claim as filed was sufficiently described by name, amount, date, &c.; and being so described, the sufficiency of the filing is not affected by the fact that it is called a note, when it is under seal; nor by the fact that it is described as payable on the day of its date, when it is in fact payable one day after date; nor by its withdrawal from the file of claims, and the failure to return it.

3. *Same; waiver of exemptions in note, and abandonment thereof.* When a note, or statement thereof, is filed as a claim against the estate of the deceased maker, whether it is necessary to state the fact

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that it contains a waiver of exemptions, is not decided; the description of the claim being otherwise sufficient, and a simple judgment for money rendered, which amounts to an abandonment of the waiver.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. JOHN B. TALLY.

This action was brought by Walden & Son, suing as partners, against L. D. Agnew, as administrator of the estate of J. R. Dorsey, deceased, and was commenced on the 18th June, 1886. The action was founded on a bond, or promissory note under seal, which, as set out in the complaint, was signed by said Dorsey, and in these words: "\$500. One day after date, I promise to pay Walden & Son, or bearer, five hundred dollars; and to secure the same, I hereby waive all exemptions or relief laws under the statutes and constitution of Alabama, the said sum being retainer to said Walden & Son as my attorneys in case of the State of Alabama against me, charged with homicide. Witness my hand," &c. The cause was tried on issue joined on the 3d, 9th, and 10th pleas, which were: (3) want of consideration; (9) partial failure of consideration; (10) the statute of non-claim. The note, or bond, was not produced on the trial, but the court admitted secondary evidence of its contents, on proof of its execution and loss; and the defendant reserved an exception to its admission on this proof. It was proved that J. R. Dorsey, at the time he executed the note, was confined in the county jail of Cherokee under a charge of murder, and employed the plaintiffs, as attorneys, to defend him; that plaintiffs prepared a petition for *habeas corpus*, to procure his release, or discharge on bail; and that said Dorsey, before the day appointed for the hearing, was taken from the jail by a mob, and hanged. The defense of a failure of consideration, total or partial, was founded on these facts.

As to the statute of non-claim, it was admitted that the defendant's letters of administration were granted on the 24th November, 1884. J. A. Walden, one of the plaintiffs, testified that he carried the note to the office of the judge of probate, on the 13th June, 1885, and had it registered as a claim against Dorsey's estate; that he left the note on file, but afterwards withdrew it, and never returned it to the file. The entry on the registry of claims was in these words: "Name of claimant, *Walden & Son*;" "Nature of claim, *note*;" "Date of claim, *October 9th, 1884*;" "Amount of claim, *\$500.00*;" "When due, *October 9th, 1884*;" "Date of filing, *June 13, 1885*." The defendant testified that, after hearing that a claim had been filed against his intestate's estate by

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Walden & Son, he went to the office of the probate judge, and asked to see it, but it was not on file; that he then went to the office of Walden & Son, and asked to see the note, but was told "that it was none of his business unless he wanted to pay it." The defendant objected to the admission of the record memorandum of the filing of the claim, on the ground that it was insufficient, and because the claim therein described was variant from the claim sued on; and he excepted to the overruling of his objection. On all the evidence adduced, the court charged the jury, if they believed the evidence, to find for the plaintiffs on the issue of the statute of non-claim, if they believed the evidence; and to this charge the defendant excepted.

The rulings on pleadings and evidence, and the charge given, are assigned as error, 19 assignments in all.

MATTHEWS, DANIEL & CARDON, for appellant.

STONE, C. J.—This case was tried on pleas numbered 3, 9 and 10, and under them the entire defense was made which could have been presented. We will not consider the rulings on the demurrers to the other pleas; for, whether right or wrong, they worked no injury.—*Mitcham v. Moore*, 73 Ala. 542; *Rice v. Drennan*, 75 Ala. 335. It is not our intention, however, to intimate there was any error in the rulings.

On the former appeal—84 Ala. 502—we held the evidence was sufficient in this case to show that a proper statement of the claim had been filed in time in the office of the judge of probate, to meet the requirements of the statute.—Code of 1886, § 2083. We adhere to what we then said. We confine it, however, to the simple fact of the debt—five hundred dollars, evidenced by the note under seal. Of this claim, as a debt against the estate, the presentation, or filing, was sufficient.

The claim sued on, as described in the complaint, and as the testimony tends to show, contains a waiver of all exemptions or relief laws under the statutes and constitution of Alabama. This is a good waiver of exemptions of personal property, but not of real estate.—*Neely v. Henry*, 63 Ala. 261. The substance of the claim, as filed and recorded in the Probate Court, states the date of the note, amount, when due, names of the payees, and date of filing. It contains no mention of the waiver of exemptions. In *Smith v. Fellows*, 58 Ala. 467, we stated some of the reasons which go to make up the policy of our legislation requiring claims

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against decedents' estates to be presented or filed within eighteen months. There may be other reasons. Personal representatives, among their first duties, are required to set apart exemptions of personal property, if there be a surviving widow, or minor child or children; and it may be that, to constitute a statement of the claim that will cut off exemptions, the waiver should be set forth, if there be one. But we need not decide this question. The judgment-entry is a simple judgment for money, and is silent as to the stipulation waiving exemptions. This amounts to an abandonment of the waiver, and a consent to accept a common judgment for money.—*Courie v. Goodwin*, 89 Ala. 569; *Brown v. Leitch*, 60 Ala. 313; *Hosea v. Talbert*, 65 Ala. 173.

Some of the questions sought to be raised are scarcely presented in such form as that we can consider them. Eliminating them, we find no error in the record.

Affirmed.

Donald Brothers & Co. v. Nelson & Sons.

Attachment and Garnishment.

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1. *Issue and service of garnishment.*—In an action commenced by original attachment, the sheriff may execute the writ by summoning a person as garnishee (Code, §§ 2945-6), himself signing the summons officially, and indorsing the service on the attachment; but the clerk has no authority to issue a summons in garnishment, directing the sheriff to summon certain named persons as garnishees; and such process being void, when no writ of attachment has been issued, its service by the sheriff is also unauthorized and void.

2. *Defects available to garnishee.*—A garnishee can not take advantage of mere irregularities in the attachment proceedings; but, when the writ is void, or the garnishment process is issued by an officer without authority, or the service thereof is unauthorized and void, he may take advantage of these defects by plea in abatement.

3. *Filing pleadings; what is revisable.*—Leave to file a replication to a plea in abatement, after the expiration of the time allowed by the rules of practice, rests in the discretion of the court, and its refusal is not revisable.

4. *Contest of garnishee's answer denying indebtedness.*—When the answer of a garnishee denies any indebtedness, and his answer is contested by the plaintiff in attachment, the issue of indebtedness *rel non* does not go beyond the service of the garnishment, though evidence of a prior indebtedness might be relevant and admissible under an issue properly formed.

5. *Summons of third person, as claimant, or transferee.*—When the

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answer of a garnishee, admitting an indebtedness or liability, further states that a third person claims the debt, money or property (Code, §§ 2984-87), the plaintiff must bring in such adverse claimant by summons or notice, and can not try his right by contesting the answer of the garnishee.

APPEAL from the Circuit Court of Mobile.
Tried before the Hon. WM. E. CLARKE.

FAITH & ERWIN, for appellants, cited *Security Loan Asso. v. Weems*, 69 Ala. 668; *Jackson v. Hailey*, 9 So. Rep. 650.

PILLANS, TORREY & HANAW, *contra*, cited Waples on Attachments, 151; Code, § 2946; *Nesbitt & Ware v. McClanahan*, 30 Ala. 68; *Curry v. Woodward*, 50 Ala. 258; Drake on Attachments, § 451*b*, 6th ed.

CLOPTON, J.—Appellants having made before the clerk of the Circuit Court the requisite affidavit and bond to obtain an attachment against the estate of James Nelson & Sons, the clerk, without issuing an attachment writ, issued a garnishment process, directed to the sheriff, and commanding him to summon W. H. Leinkauff & Sons as garnishees. The process having been served, the garnishees appeared and filed pleas in abatement, setting up that no attachment was issued, and that the sheriff was without authority to serve the summons of garnishment. Plaintiffs first moved to strike out the pleas, and then demurred; both the motion and the demurrer were overruled. On a subsequent day, the garnishees were, on their motion, discharged upon their pleas in abatement, no replication thereto having been filed, nor issue taken thereon, within the time required by the rules and practice of the court. During the hearing of this motion, plaintiffs asked leave to file a replication, which was refused. The exceptions to these several rulings constitute the first four assignments of error.

1. Section 2945 of the Code provides, that attachments may be levied on the real estate or personal property of the defendant, or may be executed by summoning any person indebted to him, or liable to him on a contract of either of the kinds specified, or having in his possession or under his control any money or effects belonging to the defendant. Under the statute, garnishment is a mode of levying an original attachment. The sheriff can not make a valid levy on real or personal property, or by garnishment, without having in his possession the attachment authorizing it. His power and duty arise when the attachment is placed in his

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hands; until then, he has no authority to act, and becomes a trespasser if he seizes the property of the defendant. The issue of the attachment and possession by the sheriff are essential pre-requisites to a valid execution by service of garnishment. No attachment having been issued, the service of the garnishment process was unauthorized and void. *Wales v. Clark*, 43 Conn. 183; *Drake on Att.* § 183a.

The attachment must be levied by the officer to whom the writ is directed; and when executed by garnishment, the officer serving must officially sign as well as serve the summons, requiring the garnishee to appear within the time and answer as to the matters prescribed in section 2946; and indorse such service on the attachment writ. Garnishment is a statutory proceeding, and can be issued only in the cases and by the officer authorized by statute. The clerk has authority to issue a garnishment in aid of a pending suit, or on a judgment, or in cases in which the process is merely auxiliary; but such authority is not conferred, when it is resorted to as a mode of levying an original attachment. The clerk is as much without authority to direct or command the sheriff to execute the attachment by summoning any particular person as garnishee, as he is to direct or command on what property the sheriff shall levy. His authority ceases with the issue of the attachment; he is not authorized to do any act thereafter in reference to, or involving the levy. It follows that the garnishment process issued by the clerk, and the service thereof, are nullities.

2. A garnishee can not avail himself of irregularities in the attachment proceedings; but when the writ is void, or the garnishment process is issued by an official without authority, or the service is invalid because of the non-existence of an attachment, the objection is available to the garnishee, and any available defects in the process may be taken advantage of by plea in abatement.—*Flash, Hartwell & Co. v. Paul, Cook & Co.*, 29 Ala. 141; *Curry v. Woodward*, 50 Ala. 258.

3. Leave to file a replication to a plea in abatement, after the expiration of the time allowed by the rules of practice, rests in the discretion of the court, the exercise of which is not revisable.—*Reed Lumber Co. v. Lewis*, 94 Ala. 627.

4. During the foregoing proceedings, after the filing of the pleas in abatement, and before the discharge of the garnishees, plaintiffs obtained, under an order of the court, the issue of an attachment based on the original affidavit and bond, which was executed, December 15, 1890, by the service of another summons of garnishment on Leinkauff &

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Sons. The garnishees answered in writing denying indebtedness, and on subsequent oral examination in court, required by plaintiffs, stated that on February 5, 1890, the captain of the steamer *Spindrift*, of which James Nelson was agent, deposited with them \$5,580 in lieu of a bond which they had made at the custom-house for the steamer, and that they were informed that the Highland Scott Steamship Company claimed the money. Thereupon, plaintiffs filed an affidavit for the purpose of contesting the answer. The affidavit and the issues were stricken out, on motion of the garnishees, on the ground of its insufficiency; and plaintiffs declining to proceed further, the garnishees were discharged. The affidavit states that, in the belief of affiant, the answer of the garnishees is untrue in this, that they were indebted, on the 14th of June, 1890, when the first garnishment was served on them, to James Nelson & Sons, and that the money deposited with them was the money of the defendants in attachment.

Section 2981 of the Code provides the mode by which a contest of the answer may be initiated: "The plaintiff, his agent, or attorney, may controvert the answer of the garnishee, by making oath, at the term the answer is made, that he believes it to be untrue; and thereupon an issue must be made up, under the direction of the court, in which the plaintiff must allege in what respect the answer is untrue." Had the affidavit stated generally that the affiant believes the answer of the garnishee to be untrue, without more, it would have been sufficient, under the statute, to inaugurate a contest. But it does not stop here; it proceeds to allege the particular respect in which the answer is untrue—that is, that the garnishees were indebted on June 14, 1890, to James Nelson & Sons; thus presenting an immaterial issue. The garnishees were required to answer only as to indebtedness at the time of the service of the garnishment, or at the time of making their answer, or at any intervening time. Code, § 2946. The garnishees may have been indebted several months prior to service of the garnishment, and yet not have been indebted at the time of the service. Whether or not there was a prior indebtedness, is not the issue to be found on such contest; though evidence thereof may be admissible, in connection with proof of its continuance, on a proper issue. In this respect, the affidavit was insufficient.

5. When a third person claims the debt or demand, or the money or effects, which by his answer the garnishee admits to be due, or in his possession, and he so informs the

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court by his answer, it becomes the duty of the court to suspend proceedings against the garnishee, and cause a notice to issue to such person to appear at the next term, and contest with the plaintiff the right to such debt, money or effects.—Code, § 2984. Prior to the enactment of 1840, which is substantially incorporated in section 2984 of the Code, the only mode by which the plaintiff could contest the validity of the transfer of the debt or effects was by controverting the answer of the garnishee, and if the issue was found in favor of the plaintiff, judgment was rendered against the garnishee. As the judgment was not conclusive on the claimant, he not being a party to the contest, the garnishee was exposed to a double liability. To remedy this evil, the act of 1840 was enacted. Since its enactment, the garnishee may protect himself against a double liability, by informing the court by his answer, or at any time before final judgment against him, that he has been notified that another person claims the debt, money or effects. In such case, judgment can not be rendered against the garnishee on his answer, until notice is served on the claimant, and the issue found in favor of the plaintiff on a contest with the claimant, or unless he is in default, or, if a resident, two notices are returned “not found.”—Code, §§ 2985, 2987. The plaintiff can not compel the garnishee to contest the validity of the claim of such third person, by controverting his answer. The garnishees having informed the court by their answer that a third person claimed the money deposited with them by the captain of the steamer, no judgment could be rendered against them on their answer at that time. *Moore v. Jones*, 13 Ala. 296; *Ex parte Opdyke*, 62 Ala. 68; *Foster v. Williamson*, 52 Ala. 16. The court having properly stricken out the affidavit as being insufficient, and the plaintiffs having declined to proceed further, and to contest with the claimant the right to the money, the garnishees were entitled to a discharge.

Affirmed.

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Bill in Equity by Municipal Corporation, for Injunction against Obstruction of Street and River Landing.

1. *Dedication of street in prospective city or town*—*Held*, as matter of fact, on consideration of the evidence in this case, that the original proprietors, under grant from the United States, of the land on which the town of Demopolis was laid off in 1819, dedicated to the public use as a highway the strip of land lying on the margin of the river, marked on the first map or plat of the town as Arch street, intending to afford to the purchasers of lots and citizens of the embryo town the advantages of free and uninterrupted access to the river, a highway of commerce. *Held*, also, as matter of law, that lots having been sold abutting on the street, and the map having been adopted as showing the limits of the town by the legislative act incorporating it, this dedication became accepted and perfect; and the validity of the dedication was not affected by the fact that said street, in its condition at that time, following the bends of the river, was in several places not susceptible of use as a highway, but required the expenditure of labor and money to make it passable.

2. *Title to land on margin of navigable river, between high-water and low-water mark*.—How far the title of a proprietor of land on the margin of a navigable river extends—whether to high-water mark, low-water mark, or the middle of the stream—is not a Federal question, though he may claim under a grant from the United States, but is to be determined by the laws of the State in which the land is situated, as declared by its statutes and judicial decisions; and the established law in Alabama is, that it extends to low-water mark, ending only where the right to the use of the water as a navigable stream begins.

3. *Right of city to erect wharves at river landing*—A city, or incorporated town, situated on a navigable river, can not, *it seems*, engage in the business of wharfing, erecting wharves, providing keepers thereof, and charging the public for their use in going or carrying property to and from the river, unless that power is conferred by special legislative act; but, when one of its streets, as laid off and dedicated to the public by the original proprietors of the land, extends along the margin of the river through its limits, the city necessarily has the implied right to construct suitable and convenient approaches to the water-line, and to make structures or excavations even beyond the water-line, such as are reasonably necessary and proper to enable the public to avail themselves of the rights of commerce and transportation afforded by the river, but having regard to the superior rights of navigation.

4. *Private use of public street, as affected by statute of limitations, lapse of time, equitable estoppel, or prescription*.—A city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or *laches* in resorting to legal remedies to remove it, nor the statute

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of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to maintain a suit in equity to remove the obstruction.

APPEAL from the Chancery Court of Marengo.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed on the 11th June, 1888, by the "City of Demopolis," against John C. Webb and wife, and W. H. Creagh; and sought (1) an injunction against the continuance of a fence, which said Webb had erected across a part of Arch street, near the river; and (2) to prevent the collection of wharfage by the defendants, at their landing on the river at or near the foot of said street. At the first hearing, on demurrer, Hon. THOS. W. COLEMAN presiding as chancellor, it was held, (1) that the bill contained equity so far, and only so far, as it sought relief against the obstruction of the street; and (2) that John C. Webb was the only proper defendant, as he alone was charged with the erection and continuance of the fence. On appeal to this court, each party assigning errors, the decree of the chancellor was in all things affirmed.—87 Ala. 659.

Afterwards, in the court below, the bill was amended to meet the objections pointed out in the opinion of this court. The amendments were these: (1) by striking out the name W. H. Creagh as defendant; (2) by adding an averment that the landing, with the right to collect wharfage, was dedicated to the public with the street; (3) that the original proprietors of the land, in dedicating Arch street to the public, did not reserve any right to construct a wharf and charge wharfage, nor have the defendants acquired any such right by privity of contract with them; (4) that the river landing, and the right to collect wharfage as incident to it, were dedicated to the public with the street.

As shown by the former report of the case, the complainant claimed the right to the uninterrupted use of the street under dedication by the proprietors of the land in 1819, and further claimed, that the street extended in width beyond high-water mark, and embraced the "Lower Warehouse property." The defendants denied the alleged dedication as a matter of fact, and claimed that the street, if dedicated at all, did not extend beyond high-water mark on the bank; and they further claimed, by way of plea and answer, that the city had relinquished and forfeited her rights by non-user for more than forty years; and pleaded *laches*, lapse of time, the statute of limitations, prescription, and equitable estoppel. Other questions were raised by demurrer to the bill as amended, but they are not decided by this court.

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On final hearing, on pleadings and proof, the court below rendered a decree as follows: "On due consideration of the pleadings and proof, as well as the arguments of counsel on each side, the court is of the opinion that the complainant is entitled to the relief prayed for in the bill as amended; and it is therefore ordered, adjudged and decreed, (1) that defendant's demurrers to the bill be, and they are hereby overruled; (2) that the street in the city of Demopolis, commonly called Arch street, as described in the bill and laid off in the original plan of the said town of Demopolis, along the bank of the river, extending from the river at low-water mark to the nearest lots surveyed and numbered in the plan of said town as shown by the maps thereof, was dedicated in the year 1819, by the then owners of the soil, to the free use of the public as a street, and as a landing, and the same should forever remain open to the free use of the public as a street and as a landing; (3) that the fence or fences erected and maintained by the defendants, or either of them, across said street, above and below the said lower landing, are public nuisances, and should be abated; (4) that the said defendants, by demanding and collecting wharfage from the people for the use of the said lower landing, or otherwise, and by obstructing the free use of said lower landing in Arch street, as averred in the bill and sustained by the evidence, have created and maintained a public nuisance, which should be abated, it being the usurpation of a franchise contrary to law. (5) It is further ordered and decreed that the defendants shall, within thirty days after notice of this decree, which notice the register is hereby ordered to have given, remove the said fences erected and maintained by them, or by their consent, both above and below said landing and near thereto, from and out of said street, and failing to do so, and notice thereof and complaint to the register, he will report such failure to the next term of the court. (6) It is further ordered and decreed, that the said defendants are hereby enjoined and restrained from obstructing the free use of said lower landing by the public in any manner, and from demanding or receiving wharfage or other pay for the mere use of said lower landing; and they are also enjoined and restrained from obstructing in any way the free use of said street by the public as a street or landing, they having no other or greater rights therein than other citizens. (7) It is further ordered and decreed that the defendants pay the costs of this suit."

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The defendants appeal from this decree, and assign each part of it as error.

GEO. W. TAYLOR, and JAMES T. JONES, for appellant.—(1.) The former appeal in this case was taken from a decree on demurrer, which admitted the material averments of the bill and the correctness of its exhibits. On that appeal, the facts being thus presented, it was decided (1) that there was a complete dedication of Arch street to the public, and (2) that the defendants were estopped to deny such dedication. On this appeal, from a decree on pleadings and proof, it is submitted that the evidence shows the incorrectness of the map or plat, called "Exhibit A" to the bill, establishes the fact that Arch street was not marked on the original map or plat of the town, and explains the additions made to the original map. It follows, then, that the defendants are not estopped to deny the dedication of Arch street as claimed, and that the legislative act adopting the plan of the town as a part of its charter does not affect the question of its dedication. (2.) It is shown that Arch street was not designated by name on any map prior to 1850, several years after the rights of defendants' grantors to the lower landing accrued, and while they were in possession of the property under claim of right; that when it was marked and designated, its width was stated to be 66 feet, leaving an open space between it and the river from 50 to 100 feet wide; and that this open space was marked "*Common, 150 feet.*" It is shown, also, that the lower landing, where the defendants' wharf is situated, is below high-water mark—in fact, is in the bank of the river; that it is separated from Arch street, so called, by a ravine which was impassable until the defendants cut a road and built a bridge; and that the public, since using the landing, have paid wharfage. As to the bearing of these facts on the question of dedication, see *Oswald v. Genet*, 15 Texas, 118; *Mayor v. Stuyvesant*, 17 N. Y. 34; 95 Amer. Dec. 729; *Municipality v. Cotton Press*, 36 Amer. Dec. 624; *O'Neill v. Annette*, 72 Amer. Dec. 367; *Shreveport v. Dronin*, 6 So. Rep. 656, La. (3.) If there was any dedication of Arch street to the public, it did not extend beyond high-water mark on the river bank, because the dedicators did not have any title beyond that.—*Gould on Waters*, §§ 24, 27, 29; *Houck on Rivers*, §§ 6, 8, 9, 10; *Pollard v. Hagan*, 3 U. S. Rep. 212, 229-30; *Mayor of Mobile v. Eslava*, 9 Porter, 577; *Mobile v. Eslava*, 16 Peters, 234; *Duval's Heirs v. McLoskey*, 1 Ala. 708; *Pollard v. Greit*, 8 Ala. 930-42; *Barney v. Keokuk*, 94 U. S. 324. (4.) The dedication of Arch

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street to the public did not take away or in any way affect the riparian rights of the owners of lots abutting on it. Gould on Waters § 72; *McManus v. Carmichael*, 3 Iowa, 1; *Leonard's Heirs v. Baton Rouge*, 4 So. Rep. 243; 2 Amer. St. Rep. 233. (5.) If there ever was any dedication of the street, or the part of the land here in controversy, it was lost by abandonment and non-user for nearly forty years.—*Gardner v. Tisdale*, 60 Amer. Dec. 407, 418; *Peoria v. Johnston*, 56 Ill. 45; *Stetson v. Faxon*, 31 Amer. Dec. 123; 5 Lawyer's Rep. Ann. 652, notes. (6.) If Arch street was dedicated to the public by the proprietors of the land, the dedication only conferred the right to make it a highway by improving it, making it passable, using and repairing it; and until this was done, a fence, or other obstruction erected on or across it, was not a public nuisance.—*Kennedy v. Williams*, 87 N. C. 6; 40 Iowa, 131; 1 Amer. Dec. 647. On the facts shown by the record in this case, the street without the fence would be impassable, and a public nuisance. (7.) The city of Demopolis has no power to erect wharves and charge wharfage, that power not having been granted by its charter. This right is a franchise belonging to the State, or pertaining to riparian owners by grant or prescription.—*Demopolis v. Webb*, 87 Ala. 659; Houck on Rivers, § 283; Gould on Waters, §§ 22, 23, 37, 120, 141, 167; *Milton v. Haden*, 32 Ala. 30; 55 Ala. 480, 490-93. If the State has not parted with this franchise by grant or prescription, it may complain of the usurpation thereof, but no one else can; and if the State has parted with it, as presumed from user and the lapse of time, the city can not maintain its suit.—Houck on Rivers, §§ 292, 299; Gould on Waters, 329, §§ 21, 92, 93; *Dutton v. Strong*, 1 Black, 1. (8.) The facts in evidence present a strong case of equitable estoppel, arising from the assertion and growth of private rights of more persuasive force than the original rights of the public long since abandoned; an estoppel which, as Mr. Dillon says, may not be matter of strict law, but is to be determined by the court according to the particular circumstances of each case "as justice and right may require."—2 Dill. Munic. Corp. § 675. The landing was not originally practicable nor accessible, except when (at a very high stage of the water) boats could discharge freights and passengers on the edge of the bluff. By artificial means, at a great expenditure of labor and money, the owners of the warehouse properly made the landing practicable at all stages, cut a road in the limestone bluff, and constructed a railroad track so laid as to make an accessible landing at every stage of the river: they created the

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landing and the approaches to it, which were necessary at that time to the development and prosperity of the prospective town, for forty years or more, before the introduction of railroads. The State did not give the town power to do this, nor to authorize others to do it, and must be held to have purposely left the matter to private enterprise, energy and capital. The public generally has reaped the benefit of the improvements thus made, for more than forty years, and the effort now is made to confiscate these property rights under a claim of antecedent public rights, which, if they ever existed, were never asserted, and were forfeited by non-user.

PETRUS & PETTUS, and GEO. G. LYON, *contra*.—(1.) The decision of this court on the former appeal settles most of the legal questions presented in this case.—*Demopolis v. Webb*, 87 Ala. 659. The evidence clearly establishes the dedication of Arch street to the public in 1819, extending to the river, and carrying with it by necessary implication, as matter of fact and of law, the right to use the banks of the river as a free public landing.—*Haight v. Keokuk*, 4 Iowa, 199; *Barney v. Keokuk*, 94 U. S. 340; *New Orleans v. United States*, 10 Peters, 717; *Godfrey v. City of Alton*, 12 Ill. 36, or 52 Amer. Dec. 478; *Lamar v. Clements*, 49 Texas, 347. (2.) The Tombigbee river being a navigable river, by constitutional guaranty, State and Federal, it is, and shall always remain, a public highway, free from any tax, duty, impost, wharfage, or other charge.—Const. Ala. 1875, Art. I, § 25; Const. Ala. 1868, Art. I, § 26; Const. Ala. 1819, Ordinance accepting terms imposed by act of Congress for admission of Alabama into the Union; U. S. Land Laws, Ed. 1838, 98, 588, 596, 310, discussed in *Mayor v. Eslava*, 9 Porter, 596. (3.) The city of Demopolis had no alienable interest in the street or landing, and could not forfeit any right therein by laches, acquiescence, the statute of limitations, or prescription.—Dill. Munic. Corp., § 533; *Wright & Rice v. Moore*, 38 Ala. 598; *Reed v. Birmingham*, 92 Ala. 339; *Jersey City v. Canal Co.*, 1 Beasley, N. J. 547; *Cross v. Mayor*, 18 N. J. Eq. 312; *Com. v. Upton*, 6 Gray, 476; *People v. Cunningham*, 1 Denio, 536; *Mills v. Hall*, 9 Wend. 315; *Com. v. McDonald*, 16 Serg. & R. 390; 4 Mart. La. 2; 4 La. Ann. 73; 13 Ill. 60. (4.) The evidence does not make out the defense of the statute of limitations, nor of prescription, since it does not show continuous adverse possession for the prescribed period of time.—*Riggs v. Fuller*, 54 Ala. 146; *Brandt v. Ogden*, 1 Johns. 156; Washb. Easement, 4th., 86, m. p., § 26.

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MCCLELLAN, J.—Other questions will be discussed and decided in the progress of this opinion, but in the view we take of the case the inquiries of paramount and determining importance are three only: *First*: Did the original proprietors of the land on which the city of Demopolis was subsequently built dedicate to the uses of the public as a street that part of said land which lies between certain numbered lots in the plat or plan of said city and the Tombigbee river, now known as Arch street? *Second*: Did such dedication, assuming it to have been efficaciously made, extend to the water-line at all stages of the river in such sort as to invest the inhabitants of Demopolis, and the public generally, with the right to pass, in their persons and property, from said street on to the river, and from the river on to the street, without toll, charge or hindrance? *Third*: Has this public right, assuming its original existence, been lost, so far as it pertained to that part of said street which has been appropriated by the respondents, by reason of the character, extent and duration of their possession, occupancy, and use thereof?

The land in question, and which now constitutes the city of Demopolis, was purchased by George S. Gaines, acting for himself and certain associates, in the year 1819, from the United States; and he received patents therefor, which were "intended by him, and recognized by him, as being issued to him" for a company consisting of himself, William A. Cobb and others. This company had been formed for the purpose of purchasing said land at the Government sales, soon thereafter to be made, with a view to, and for the purpose of, laying off and establishing a town thereon, and selling lots therein. The land was exceptionally well located for the establishment and upbuilding of a town under then existing conditions of commerce and transportation, being at a high point on the Tombigbee river, a navigable stream, emptying into the Bay of Mobile, just below its confluence with the Black Warrior river, another navigable stream. And it was doubtless these considerations which not only led to the selection of this site, but which also gave birth to the great expectations, indicated by the handsome prices at which lots in the embryo city were sold, which were indulged as to its future—expectations which probably only failed of full realization in consequence of the application of steam as a motive power to inland transportation, whereby the importance of water-ways was greatly lessened. Be that as it may, it is certain the chief inducement to the location of Demopolis at this point lay

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in the facilities for commerce and transportation which the river afforded, and doubtless this consideration was put prominently forward in the efforts made by the company to sell its lots in the town. The river thus being a leading inducement to the location of the town and to the purchase of lots therein, it would have been singular indeed if the proprietors of the site had not made provision looking to the utilization of this water-way by those who had been induced in great part to settle there, because of the facilities for transportation offered by it, and the public at large, by so laying out the town as to afford easy access to the river from the town, and *vice versa*. They did not fail to make such provision, but left the whole river front of the city open, unobstructed, and free of access. It is not controverted at all that on every plan, plat or map of the town, from the first one made by Stone soon after the purchase of the land, and by reference to which the original sales of lots were made, down to the last one made only a few years ago—all later maps being more or less accurate copies of the one made by Stone—on every map now extant, or that has ever existed, there appears an open space along the river front entirely through the town, varying in width from, perhaps, one hundred to two hundred feet, with the irregular course of the stream, and extending, throughout its course, to the water's edge. The physical characteristics of this space, so far as they appear from the maps, are the same, except as to the irregularity in width, just referred to, and as to variance of direction incident to the tortuous course of the river, as are incident to the many other vacant spaces shown by the maps; and these other spaces are admitted to be streets of the town. In other words, one looking at any map of the town which has been brought to light on this trial, with a view to ascertaining the location of the streets, would inevitably conclude that this unplatted margin along the river was one of those streets. And such, we have no doubt, it was intended to be by the Demopolis Town Company, when the site was laid off into public squares, streets and lots, for the purposes of sales then contemplated and afterwards made by the company. This, we think, the evidence demonstrates; and not only this—not only that this margin was laid off as, and intended to be a street—but also that this street was in the outset named and called "Arch Street." Mr. Geo. G. Lyon testified, that he had seen the original plan or map made by C. C. Stone and adopted by the Commissioners of the Demopolis Town Company in 1819, by reference to which the first sales were

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made, and from which all other maps of the town were taken, more or less directly; and that on this original map the margin or unplatted space along the river front was designated as "Arch street;" and that he lived on this street for ten years, from 1841 to 1851, and always heard it called "Arch street." Mr. A. M. McDowell appends to his deposition a map made by C. C. Stone, and which the witness believes to be the original map above referred to—as to which, however, there is at least grave doubt—and this old map shows, as do all other maps, an open margin along the entire river front, which presents the appearance of a street; and this margin at one place is marked "Water street," and at another place, in a hand-writing differing from that elsewhere shown on the map, and from the inscription "Water street," it is marked "Demo street." This inscription appears to have been made at a later date than any other on the map. This witness testifies, also, that the initial point of the survey of the town of Demopolis was originally marked by an oak tree which stood in this street; that this tree had been removed, and he himself had placed an iron shaft where it stood, for the purpose of preserving a memorial of the starting point of the survey. And the location of this tree is marked and identified on the map which he exhibits, by a star placed near the intersection of Fulton street with this street on the bank of the river, and referred to in the notes written on the margin of the map thus: "*Post Oak, bears S. 12 E., 8 links (†)"

But the most satisfactory evidence that the proprietors of the town site laid this margin off as a street, intended if to be a street, and named it "Arch street," is found in the record of the proceedings, of the commissioners who constituted the managing and governing board of the Demopolis Town Company. It appears from these records that said commissioners, at a meeting held on Tuesday, June 18, 1819, "*Resolved*, That the plan of the town of Demopolis be as follows: The streets to run due north and south on a true meridian variation, seven degrees and forty-five minutes east, and to be crossed by streets running due east and west at right angles. The squares to contain two acres of land, exclusive of an alley of twelve feet wide running from north to south. The streets of the town to be sixty feet, excepting Fulton street running from east to west, one hundred feet; Capital street, from east to west, likewise one hundred feet; Market street, running from north to south, one hundred feet. *Resolved*, that one square or block of lots containing eight

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in number, bounded north by Capital street and west by Market street, be reserved for the erection of such buildings as the commissioners may hereafter determine on. The plan of said town is herewith filed, which is made a part of this record, *signed by the commissioners* as the true plan of the town of Demopolis; by which plan the town commences at that point *where Fulton street intersects ARCH STREET*, which said point is designated *by a post-oak tree*, in or about twenty inches in diameter, which said tree stands south of said point of intersection or corner twelve degrees east, and distant eight links from said corner, marked with the following letters and characters: * *lettered S. 12 E. 8 Lk.*, which said point is on the original survey of the United States Government of fractional section No. twenty-four, and is opposite the crevice in the bank of the Tombigbee River." The italicization in the foregoing excerpt is ours. It has been employed for the purposes of giving emphasis to the facts, that the plan or map adopted by the commissioners *was signed* by them, while the map exhibited by McDowell is not so signed; that the margin of the river was laid off on the original plan as a street, and called and named thereon "Arch street," and not "Water street," or "Demo street," as appears from McDowell's map; and that the tree which marked the initial point of the survey was located on "Arch street," and opposite "the crevice in the bank of the river," which latter fact is shown also by McDowell's map; all of which leads to the conclusion, that the map exhibited by McDowell is not the original plan or map adopted by the commissioners, but a copy thereof, and accurate in so far as it shows that the land between the numbered lots and the river was intend to be, and in fact was, laid off as a street, but inaccurate in so far as it gives the name "Water" or "Demo" to this street. We attach no importance to the fact that the commissioners, in the resolutions quoted, did not state either the direction or width of Arch street. It ran neither north and south, nor east and west, but *arched* with the bend of the river, and hence doubtless its name. Its width likewise varied with the meanderings of the stream, and hence it could not be said to be any particular number of feet wide. But, however irregular its course, and however variant its width, this record demonstrates beyond all doubt to our minds that it was laid off as a street in the original plan of the town; that as such it extended along the entire river front of the town, and that throughout its length it was named,

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known and called "Arch street." So far then as that could be accomplished by laying off an area in the plan or map of a town having the appearance of a street on such map, intended by the proprietors of the town-site to be a street, and marked on said plan as a street with a name appropriate thereto, this "Arch street" in the town of Demopolis was dedicated to the public as a street, by that name, on June 18, 1819, when said plan was adopted and promulgated "as the true plan of the town of Demopolis."

One thing more, and only one thing, was necessary to complete the dedication so as to make it forever irrevocable. That one thing was the sale and conveyance of lots, or even the sale and conveyance of a single lot, in the town of Demopolis, by reference to and according to the survey lines of the plan or map which had this street marked upon it. By such sales, or one such sale, every line of the survey which served to mark those parts of the site which were intended to be reserved from sale for the use of the public became unalterably fixed—dedicated to the public for all time.—*Webb v. Demopolis*, 87 Ala. 569; *Evans v. C. & W. Railway Co.*, 90 Ala. 54; *Reed v. Mayor & Aldermen of Birmingham*, 92 Ala. 339; *Elliott on Roads and Streets*, p. 89. It is uncontroverted that lots were sold and conveyed according and by reference to this plan, soon after its adoption, and from time to time since then. Not only so, but the dedication of the streets of Demopolis, and among the rest Arch street, was accepted in the most formal manner by an act of the legislature of Alabama, incorporating the town of Demopolis, approved December 15, 1821, in which it is provided: "That all the tract of land included in the plan of said town [the plan adopted by the commissioners in 1819] be, and the same is declared to be, the limits of said town in conformity to said plan."—*Elliott on Roads and Streets*, 85. So that there can be no doubt that there was both a common-law and a statutory acceptance of the dedication of the street.

As to the extent of this dedication, or rather as to the limits of the street as dedicated, with reference to the river, there can not, we think, be two opinions so far as the question depends upon the intention of the proprietors of the soil. In view of the considerations which led to the establishment of a town at that point, the advantages expected to accrue to the inhabitants thereof from the facilities for transportation and commerce, which the juxtaposition of this water-way offered, and the necessity to utilize and conserve these advantages by affording the public ready and

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unobstructed access to the river,—considerations to which we have before adverted,—and in view of the fact that, as appears from all the maps, no disposition of any part of the river front to private uses was contemplated by the founders of Demopolis and the dedicators of this street, the conclusion can not be resisted, that they intended that this street should embrace all that part of the site of the town which lay between the numbered lots and the water's edge at all stages of the river. In no other way could their manifest purpose of providing a common highway, not only along, but to and on the river, be effectuated. And this purpose must be held to have been effectuated, if they, the proprietors of the soil, had the right to dedicate the land to low-water mark, or, in other words, if their proprietorship extended to the low-water line.

We can not concur in the argument of counsel, to the effect that whether a grant of the United States to land lying on a navigable stream within the limits of a State extends to high or to low-water mark, or to the middle thread of the stream, is a Federal question, upon which the Supreme Court of the United States is the final arbiter. This is not the law. On the contrary, no proposition of law is more firmly settled, than that this is a matter purely within the control of the several States, and determinable in all instances according to the rule in respect thereto which has been established by statute, or by adjudications of courts of last resort or otherwise, by the States themselves. And whatever rule has been so established is said to be the common law of the State where the land is situated, and as such will be enforced in all jurisdictions. This doctrine proceeds on the theory, that inasmuch as the State owns in its sovereign capacity the soil under the waters of navigable streams, it is within the State's competency to determine to what extent its prerogatives to lands so submerged shall be exercised, and to what extent such prerogative shall be abated, or not asserted and exercised, in the sense of admitting individual proprietorship in such lands, subject only to those rights of eminent domain over the waters and the lands covered thereby which are inseparable from sovereignty. And upon this theory it is universally held, that a grant by the United States of land lying in a State, and abutting on a navigable stream, will extend to high-water mark, or low-water mark, or to the middle of the stream, according to the rule which the particular State has adopted as to the construction and extent of such grant. The late Justice Bradley in a recent case, after stating the doctrine

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of the State's proprietorship in the banks and shores of navigable streams and waters, proceeds: "This right of the States to regulate and control the shores of tide-waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio; and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised. In the case of *Barney v. Keokuk*, 94 U. S. 324, we held that it is for the several States themselves to determine this question, and that if they chose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. That was a case which arose in the State of Iowa, in regard to land on the banks of the Mississippi, in the city of Keokuk; and it appearing to be the settled law of that State, that the title of riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low-water mark, as well as the bed of the river, belongs to the State, this court accepted the local law as that which was to govern the case. The same view was taken in quite a recent case with regard to titles on the Sacramento River, under the law of California.—*Packer v. Bird*, 137 U. S. 661. On the east side of the Mississippi, in the States of Illinois and Mississippi, a different doctrine prevails, and in those States it is held that the title of the riparian proprietor extends to the middle of the current in conformity to the rule of the common law, that the beds of all streams above the flow of the tide, whether actually navigable or not, belongs to the proprietor of the adjoining lands.—*Middleton v. Pritchard*, 3 Scammon, 510; *Morgan v. Reading*, 3 Sm. & Mar. 366; *St. Louis v. Rutz*, 138 U. S. 226. In the one case, that of Iowa, the Government grant was held to extend only to high-water mark; and in the other cases, of Illinois and Mississippi, it was held to extend to the centre of the stream; being governed in both cases by the respective laws of the States affecting the grants of lands bordering on the river. In the one case, the State, by its general law, does not allow the grant to enure to the individual further than to the water's edge, reserving to itself the ownership and control of the river bed; in the other cases, the States allow

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the full common-law effect of the grant to enure to the grantee."—*Hardin v. Jordan*, 140 U. S. 371, 382-3.

There was in this case a dissenting opinion by Brewer, J. concurred in by Gray and Brown, JJ. The dissent, however, was not on the point we have been considering, but from the conclusion of the majority of the court as to what was the rule of law in this connection in Illinois, respecting lands under the waters of *lakes and ponds*; a different rule, these judges conceived, being established in that State as to such lands, from that which obtained there as to lands under running water. And on the point we have here, Mr. Justice Brewer said: "Beyond all dispute, the settled law of this court, established by repeated decisions, is, that the question of how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the State, and the decisions of its highest court, furnish the best and the final authority."—*Hardin v. Jordan*, *supra*, p. 402. And the same doctrine is clearly announced in the still later case of *Kankanna Water Power Co. v. Green Bay & Mississippi Canal Co.*, 142 U. S. 255; and there can be no question of its soundness in principle, and thorough establishment by the authorities.

Whether the grant made by the United States to George S. Gaines for the Demopolis Town Company, and which enured to its benefit, of the land upon which the city of Demopolis now stands, extended to ordinary high-water mark, or to the line of the low water, or to the middle thread of the Tombigbee river, depends, therefore, upon the rule of property in this respect, which Alabama has adopted. The rule which this State has adopted and declared through this court is, that a grant by the United States to land bordering on a navigable river includes the shore or bank of such river, and extends to the water line thereof at low water.—*Williams v. Glover*, 66 Ala. 189; *City of Demopolis v. Webb*, 87 Ala. 670. And this doctrine was long ago applied in a case like the one at bar, this court holding that the dedication of a street bordering on navigable water extends to low-water mark.—*Doe, ex dem. v. Jones*, 11 Ala. 63.

Applying this rule of property to the grant of the United States to George S. Gaines and associates, constituting the Demopolis Town Company, of the land upon which the town was subsequently built, the result is to invest said purchasers with title to said land down to the low-water line of the river; and they, having, as we have seen, the *animus dedicandi* coextensive with their proprietorship of

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the land between the line of the adjacent numbered lots and the river, must be held to have efficiently, and, when taken in connection with the acceptance by the public, which the record shows, irrevocably dedicated the whole space from said lots to low-water mark to the public as a street under the name of "Arch street."

Our conviction that this result is enforced by the evidence is in no degree weakened by the testimony of some of the witnesses, to the effect that they never knew there was a street in Demopolis along the margin of the river; or of yet some others, who say they never heard of "Arch street" prior to the inception of this litigation. It is not unusual, we feel safe in saying, for the names of streets in towns of the size of Demopolis to fall into disuse and oblivion, or for streets laid off in town maps and dedicated to remain unopened, or, being once opened, to be closed to the public and occupied for private purposes. And that this is true of Demopolis abundantly appears from the evidence here, going, as it does, to show that not a few of the other streets, as to the dedication of which there is no controversy, had remained or become closed in whole or in part, and that many of the citizens of the town, long resident there, were ignorant of the names of various streets which had been all along open, used and recognized as streets.

Nor is it a matter of any moment that the ground constituting Arch street could not, in its natural state, be used throughout its length as a street. It would not, we apprehend, be controverted, it is not in fact controverted, that it was feasible to overcome all obstructions to the use of this street which the character of the surface over which it was laid out presented. Nor can it be controverted that it *had* to be, and has all the time been, used at one point or others for the purposes of access to and regress from the river. It is to be doubted whether a single street in the town of Demopolis, as laid down on the virgin soil in the year 1819, could, in its then natural state, have been used for the purposes of its dedication; possibly others of them than Arch street required great labor and expense to adapt them to the uses of highways; and if Arch street was more rugged and required greater exertion to make it practicable for the passage of persons and the transportation of property along its course, or across it to the river, the necessity for such exertion was the more imperative, in that it alone of all the streets of the town afforded an outlet to the river, commerce on which constituted so important a factor in the life and prosperity of the

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town. But aside from all this, a dedication of land as a street can in no case, in our opinion, be defeated by considerations going to the relative adaptability of the land to that end, or to difficulties of subjecting it to such uses in point of fact, or to the extent of the use to which it will be subjected when its natural obstructions have been removed, or even to the necessity to so use it all.—*City of Dubuque v. Malonly*, 74 Amer. Dec. 358; *Hanson v. Eastman*, 21 Minn. 509; *Regina v. Spence*, 11 Upper Canada G. B. 31.

The Tombigbee river, opposite the city of Demopolis, is a navigable stream, on which the public have the right of transportation of person and property, free of all charges or imposts whatever, subject to such regulations as Government may deem just and expedient in conservation of the public easement. In juxtaposition to this easement is that other which the public have in Arch street, and this latter extends to and ends only at the point where the former begins. There is, and in the nature of things can be, no particle or *scintilla* of space between that side of Arch street furthest from the river and the water-line of the river furthest from the town of Demopolis, which is not covered by one or the other of these easements, and over which the public would not have the same right to pass and transport property as they would have along the course of Arch street, or up and down the current of the stream; and it follows as a necessary consequence, that an obstruction to the use of this street for the purpose of going on to the river, would be as violative of public right, and as unlawful, as an obstruction to its use for the purpose of going along it from one part to another of the town. These propositions are, to our minds, self-establishing results from the existence, side by side, and extending to the touch with each other, of these two public easements, and they are abundantly supported by authority.—*Godfrey v. City of Alton*, 12 Ill. 36; s. c., 52 Amer. Dec. 478; *Haight v. City of Keokuk*, 4 Iowa, 199; *Barney v. Keokuk*, 94 U. S. 340; *New Orleans v. United States*, 10 Peters, 717.

Nor do we question the right and power of the city of Demopolis to provide facilities looking to the use of this street as a means for the passage of persons and property back and forth from the town to the river. The right to so use it free of charge being in the public, it may be, indeed we are inclined to that view, that the city could not, without special statutory authority, engage in the business of wharfing in the sense of erecting wharves, providing keepers thereof, and charging the public for the privilege of using

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them in going to or from the river, or in lading or unlading property from or on them. But we do not doubt that the city, in the absence of legislative delegation of it, has the power and authority which is implied from the location of this street, and the manifest purposes of its dedication, not only to make suitable and convenient approaches from the town to the water-line, but also to make such structures or excavations, at and even beyond the water-line, having regard to the rights of navigation, as are reasonably necessary and proper to enable the public to conveniently avail themselves of the rights of commerce and transportation which the river offers. The existence and exercise of the right to do this is essential to the enjoyment of that other right, which the inhabitants of the town and the public incontrovertibly have, to pass in their persons and effects from the town to the river, and *vice versa*; and hence is a right implied from its necessary connection with a right which is expressly granted. It is based on the same principle of necessity as that under which a municipality would rest to adjust the grade of a street with the grade of a public road leading up to its corporate line, and which, we apprehend, might, when necessary, be done by depressing or elevating the latter; though, dissociated from the street, the municipal authorities would have no power to build or change a highway beyond the lines of the town. So, too, we should say, that where the corporate line is on the near bank of a stream, ravine or ditch, which could only be passed by means of a bridge, the municipality, though without express power to build bridges beyond its own territory, would be authorized to gain access to the outside world by bridging such stream, ravine or ditch, wherever it should be intersected by streets. And *a fortiori* would this be true, where, as in this case, the chief, if not the only purpose of the particular dedication, was to afford egress beyond such barrier. It was upon considerations of this sort that it has been held in several well reasoned cases that a town has the implied power to erect wharves for the convenience of the public under circumstances such are found in the present case. *Rowan's Ex'rs v. Portland*, 8 B. Monroe, 232; *Newport v. Taylor's Ex'rs*, 16 B. Monroe, 699, and 804; *Potomac Steam Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 686-7.

This view disposes of the argument for appellants which proceeds on the supposed want of authority in the city of Demopolis to erect wharves and the like, and the consequent necessity for this to be done by a private enterprise, to the conclusion that appellants had the right they exercised.

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cised to erect wharves at the "Lower Landing," and charge the public for the use thereof.

Having thus reached the conclusion that the whole of Arch street, extending to lower-water mark, was dedicated to the public, it is next to be considered whether the easement vested in the public has been lost. It is strenuously insisted for appellants that it has been lost, so far as respects that part of the street now occupied by them, including what is known as the "Lower Landing," on the river front of Demopolis, through the possession of themselves and their predecessors in ownership of the lower warehouse property for a great period of time, under an exclusive claim of right, and the application to these facts of the doctrine of prescription. On this question of possession on the part of appellants, and those under whom they claim, of the street and landing in question, the character of that possession, its duration, &c., a great mass of testimony has been taken by each side. We have read it carefully, more for the purpose of finding evidence of relevant and material facts than with a view to determining whether a possession of the character set up in the pleadings had existed, and, if so, for what length of time. These inquiries we deem entirely immaterial to any issue in the cause. Without going at all into them, or intending by what we say to indicate what our conclusion in respect to them would have been had they been deemed relevant inquiries, we will concede, for the argument, that the appellants and their predecessors in ownership of the lower warehouse property had, without interruption, since 1844 had actual possession of said street, said lower landing, and the immediate approaches thereto; that this actual possession has all along been exclusive of the whole world; that continuously during all that time they have claimed title to said landing and the approaches, and so much of said street as has been occupied by them, and have claimed in all cases, and exercised at pleasure, the right to charge all persons for the privilege of using said landing as a wharf; and further, that they have greatly improved the landing and approaches thereto—have, if you please, *created* the landing, in the sense of building the approaches to it, and providing all the facilities which now exist, or have ever existed for reaching and going on the river at that point; or, in other words, we will concede every thing which appellants claim as to the *facts* of their relation to this landing.

But all this will not help them. The law applied to these facts does not enforce any result of benefit to them. No

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statute of limitations, or principle of repose, obtains here. Neither the statute of limitations, nor the rule which carries title to adverse possession, nor the doctrines of staleness, equitable estoppel or prescription, can be invoked or applied against the right of the city of Demopolis, and of the public, to have this street opened from end to end, and from side to side, from the municipal line on the north to the municipal line on the south-east, and from the numbered lots of the town to lower-water mark of the stream, and devoted to the uses to which it was dedicated by the original proprietors in 1819. The city never had any alienable title to, or right in the street. It could never have granted it, or any part of it away, for any purpose whatever. Having no power of direct alienation, it could not pass title indirectly by submitting for the statutory period to private possession, claim and use. Having no power to grant it, no grant can be presumed from the lapse of time, however great, during which it has allowed respondents to deal with a part of it as belonging to them. Respondents being held to know—a rule, the propriety of which is emphasized here by the muniments of their title to the warehouse property, which show the fact—that all the space between their lots and the low-water line of the river was in and constituted Arch street, expended money and labor in putting improvements thereon at their own peril, and in recognition of the right of the city to deprive them of all private benefit therefrom by throwing the entire street open to the free use of the public, whenever the municipal authorities deemed it expedient so to do; and hence no element of equitable estoppel against the public enters into their claim.

These positions are well grounded in text and adjudged cases, including recent adjudications of this court. Judge Dillon, after stating the views of several courts of last resort on this subject, sums up what he considers the true doctrine as follows: "Municipal corporations, as we have seen, have in some respects a double character—one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. . . . But such corporation does not own, and can not alien, public streets or places, and no mere *laches* on its part, or that of its officers, can defeat the right of the public thereto."—2 Dillon Mun. Corp. § 675. And the author incorporates in the text the views of the Supreme Court of Pennsylvania, to this effect: "Streets and Vol. 95.

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public squares are dedicated or acquired for the *public* use, not alone for that of the people of the city, the corporation being the mere trustee for the public; that erections by private persons on property thus dedicated or acquired, can not be authorized by the original proprietor, or by the city corporation, and can be authorized only by the legislature; that unauthorized erections or obstructions thereon are public nuisances, . . . ; and that in the absence of a grant shown from a competent source, no presumption from mere lapse of time can be made to support a public nuisance which is an encroachment on a public right." And he quotes with approval from an opinion of Mr. Justice Sargeant the following language: "These principles of law, as well as our own Code, are essential to the protection of public rights, which would be gradually frittered away, if the want of complaint or prosecution gave the party a right. Individuals may reasonably be held to a limited period to enforce their rights against occupants, because they have an interest sufficient to make them vigilant. But in public rights of property each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right."—2 Dillon Munic. Corp., § 669; *Com. v. Alburger*, 1 Whart. (Pa.) 469, 488; *Sims v. Chattanooga*, 1 Lea (Tenn.) 694; *Jersey City v. M. C. & B. Co.*, 12 N. J. Eq. 557, 561.

And this doctrine has been fully adopted by this court in more than one case, the last being that of *Reed v. Mayor & Ald. of Birmingham*, 92 Ala. 339, 348-9, citing *Olive v. State*, 86 Ala. 88, where the same principle is "broadly asserted;" and quoting as above from Dillon on Municipal Corporations, and as follows from Elliott on Roads & Streets, p. 490: "There can be no rightful permanent possession of a public highway for private purposes; and although a right to maintain a private nuisance may in some cases be acquired by prescription, no length of time will render a public nuisance, such as the obstruction of a highway, legal, or give the person guilty of maintaining it any right to continue it to the detriment of the public." See, also, Elliott on Roads & Streets, 667 *et seq.* This may now be said to be the established law of Alabama.

That the private use of a public highway of a character which is subversive of its use by the public as a thoroughfare may be perpetuated in any case by the invocation of the doctrine of estoppel *in pais* against the municipality in which the highway lies, we very much doubt. It would seem on principle that, inasmuch as the municipality has

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no alienable right in such highway, none which could be lost through its *laches*, or through actual private possession under a claim of exclusive right, but holds the *locus in quo* not only for itself, and for its own citizens, but in trust for the public at large, whose rights therein are in no wise dependent upon anything the municipality may do or omit to do; that nothing done or omitted by a city in the way of allowing, or even inducing persons to make erections on a street, which obstruct and interfere with its use, could or ought to estop the public to have such obstruction removed, or to have them removed at the suit of their trustee and agent, the municipal corporation. Yet Judge Dillon says, there may possibly be instances of such estoppel; but he adds, that "such cases are exceptional in their character, and it would, perhaps, be going too far to say that the courts have distinctly established such a principle."—2 Dillon on Munic. Corp., § 667. And the Messrs. Elliott, in their valuable work on Roads & Streets, say, that while some courts, "influenced, perhaps, by the hardship that would result from a contrary holding in the particular cases under consideration, have applied the doctrine of equitable estoppel where the claimant had made expensive improvements," &c., yet, it is doubtful, they say, "if the doctrine of these cases can be sustained upon principle," except perhaps where the city has by affirmative action misled the claimant. And the text proceeds: "It is difficult to conceive upon what principle an equitable estoppel can be securely placed in such cases; for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public, that the local authorities can neither directly nor indirectly alien the way, and that they can not divert it to a private use. As the person who uses the highway must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of an estoppel is absent. An estoppel can not exist where the knowledge of both parties is equal, and nothing is done by the one to mislead the other. In addition to this consideration may be noticed another influential one, already suggested in a different connection; and that is, the private use of the public way was wrong in the beginning, and wrong each day of its continuance; and it is a strange perversion of principle to declare, that one who basis his claim on the original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel, and a wide departure from the rules laid down by the earlier decisions, and confirmed by

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the modern authorities."—Elliott on Roads & Streets, pp. 669 and 670.

We adopt the principle thus declared, and it leads inevitably to the conclusion that, on the facts of this case, there was no estoppel resting on the city of Demopolis to assert the rights advanced by this bill; and if it were necessary to pass on the point in the present case, we should be much inclined to hold that no act, or omission to act, on the part of the municipality with reference to obstructions in public streets, could in any case raise up an estoppel against it to proceed in the interest of the public to have such obstructions removed, however long they had been allowed to remain in the street.

This brings us to the final conclusion, that the respondents had originally no right to obstruct any part of Arch street, or to use any part of it as a private landing, or as a public landing not free of charge for the right to use it; and that no element of right has been injected into their claim by the efflux of time, or the direction and character of their occupation and use of a part of the street as their private property.

Several other questions are presented by the assignments of error. They are either not insisted on in the argument, or are fully covered by the exhaustive opinion delivered by this court through Mr. Justice SOMERVILLE, when the cause was here on demurrer to the bill; and, seeing no reason to depart from what was then said, we re-affirm that decision throughout.—*Webb v. Demopolis*, 87 Ala. 659. That and the foregoing opinion embrace all the points of this controversy, and determine them all adversely to the appellants, entitling the complainant below to the relief prayed in its amended bill, and granted by the Chancellor; and the decree to that end is in all things affirmed.

Savannah & Western Railroad Co. v. Meadors.

Action for Damages against Railroad Company, by Administrator of Person Killed.

1. *Trespassers on railroad track; in thickly populated part of city or town.*—When a railroad track runs through a thickly populated part

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of a city, town or village, where the demands of trade and public intercourse necessitate the frequent crossing of the track, it is the duty of those operating an engine along the track to keep a diligent lookout for persons who may be on it; not because such duty is specially imposed by statute, but because it arises from the particular facts and circumstances, which make it probable that persons are on the track, and that injury may result unless due care is observed; and the duty only arises when the two facts co-exist, (1) a custom or usage in crossing the track at that place, and (2) the demands of trade and intercourse justifying it. But the track of a railroad can not be converted into a road for ordinary travel, and one who undertakes to make such use of it is a trespasser. (This is "the extent of the rule declared in *M. & C. R. R. Co. v. Womack*, 84 Ala. 150, and in accord with *Geo. Pac. R. R. Co. v. Blanton*, 84 Ala. 154; and as thus qualified, the case of *S. & N. Ala. R. R. Co. v. Donovan*, 84 Ala. 148, is re-affirmed.")

2. *Same; contributory negligence, and how overcome as defense.*—A person who walks on a railroad track at night, in a deep cut four or five hundred yards long, within the corporate limits of a city or town, where there are no intersecting streets or crossings, is a mere trespasser, and being run over and killed by a train approaching from behind, his contributory negligence prevents a recovery of damages by his personal representative, unless it is shown that the person in charge of the train discovered him in time to avoid the injury, and failed to exercise due care and diligence to avoid it.

3. *Statutory duties of engineer; failure to perform as negligence.*—The statutory duty imposed on the engineer of a railroad train moving or passing through a city or town, to blow the whistle or ring the bell at short intervals (Code, § 1144), is co-extensive with the corporate limits of the city or town; but the failure to perform this duty is simple negligence merely, and is not sufficient to overcome the defense of contributory negligence on the part of plaintiff or his intestate.

4. *Correspondence of pleadings and proof.*—Under a count which avers simple negligence, in an action to recover damages for personal injuries, a recovery may be had on proof of wanton or reckless negligence.

5. *Sufficiency of complaint in averments of negligence.*—In an action for damages against a railroad company, by the administrator of a person who was run over and killed by a train of cars within the corporate limits of a city or town, a count which avers that the engineer did not blow the whistle or ring the bell at short intervals while moving through the city, and that "owing to such failure said intestate was killed;" and a count which avers that the accident occurred near a public crossing, that the engineer did not blow the whistle or ring the bell at least one-fourth of a mile before reaching said crossing, and continue to do so at short intervals until he had passed the crossing, "and that said intestate was killed on account of such omission;" and a count which avers that, "at the time of the killing of said intestate, said engine was being run negligently in this, it was a dark night, the engine had no head-light, and was being run rapidly, and on account of said negligence said intestate was killed,"—each is sufficient in its averments of negligence. But a count which shows

*The opinion in this case was delivered on the 5th November, 1891, five days before the case of *Glass v. M. & C. R. R. Co.* 94 Ala. 541, was decided; but the papers were mislaid, and did not come to the hands of the reporter in time for publication in 94 Ala.

[Savannah & Western Railroad Co. v. Meadors.]

that the intestate was a mere trespasser on the railroad track at the time he was killed, or was otherwise guilty of contributory negligence, must allege or show more than simple negligence on the part of the persons in charge of the train—must show wanton or reckless negligence on their part, or intentional injury.

APPEAL from the Circuit Court of Lee.

Tried before the Hon. JESSE M. CARMICHAEL.

This action was brought by Fannie Meadors, as administratrix of the estate of her deceased husband, Robert Meadors, who was run over and killed, on the night of September, 1888, within the corporate limits of the city of Opelika, by an engine and train of cars belonging to the defendant railroad company. The opinion states the facts connected with the killing, so far as material to the points here decided, and renders any further statement unnecessary.

The complaint contained four counts, each of which, after amendment, alleged that the injury occurred within the corporate limits of Opelika. The first count alleged that the engineer in charge of the train "did not blow the whistle or ring the bell at short intervals, while moving within said city along said road, and that owing to such failure to ring the bell or blow the whistle said intestate was killed." The second count alleged that the accident occurred near a public road crossing; that the engineer did not blow the whistle or ring the bell at least one-fourth of a mile before reaching said crossing, and continue to blow the whistle or ring the bell, at short intervals, until he had passed the crossing, "and on account of such omission said intestate was killed." The third count alleged that the engine and cars ran over and killed the intestate "in a deep cut in a curve in said road, within less than one-fourth of a mile from a public road crossing; that said engineer could not see one-fourth of a mile ahead, and did not blow the whistle or ring the bell before entering said curve, and that owing to such omission said intestate was killed." The fourth count alleged that, at the time of the killing, "said engine was being run negligently in this—that it was a dark night, said engine had no head-light at the time, and was being run rapidly; and on account of said negligence said intestate was killed."

The defendant demurred to each of these counts, "because each shows that plaintiff's intestate contributed to the injury complained of, by being on defendant's track, and does not show that defendant wantonly, recklessly, or willfully injured him;" also, "to the first, second and third counts,

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because each fails to show that the injury complained of resulted from, was contributed to, or was caused by said failure to blow the whistle or ring the bell; also, "to the second and third counts, because each fails to show that said intestate was at a public road crossing, or other place where defendant owed him the duty alleged to have been omitted;" also, to the fourth count, (1) "because it assumes that to run a train rapidly is negligence, and (2) because it fails to show that the alleged injury resulted from, was contributed to, or was caused by the negligence therein "averred." After the counts were amended, an additional demurrer was filed, "because each count fails to show that the injury complained of occurred in the populous or business part of said city, or at any depot, street crossing, or other place where necessity compelled, or common usage gave color of sanction for said intestate to be upon the railway track." The court overruled the demurrers, and issue was then joined on the pleas of not guilty and contributory negligence.

The defendant excepted to the following portions of the general charge given by the court, "as a whole and separately, and especially to those portions thereof which are underscored" (italicized). (1.) "If the plaintiff has shown that her intestate was killed by the defendant's engine while running on the defendant's railroad track within the corporate limits of the city of Opelika, this shifts the burden of proof to the defendant, and it then becomes its duty to absolve itself from liability for the killing in one of three ways: (1) by showing that it did not do the killing; or (2) by showing that the killing, if done by it, was not done by reason of negligence and without fault of the deceased; or (3), no matter how the killing was done, it was contributed to proximately by the negligence of the deceased." (2.) "In the city, a careful watch must be kept for trespassers upon the track; not because a trespasser has any more right to the use of the track in a city than in the country, but because there are larger numbers of people in a city, and because from habit, custom or necessity they are more often on the track, and the law, recognizing these facts, makes it the duty of those in charge of engines and cars to keep a watch for persons on the track in a city, and to avoid injuring them if it can be done." (3.) "The law imposes certain duties on those running trains within the corporate limits of a city, and a failure to perform and discharge such duties is a want of care on the part of the road, amounting to negligence. Among these duties may be mentioned (1) *the duty to keep a watch-out for trespassers, or persons on the*

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track, and (2) the duty, while passing through the city, to ring the bell or blow the whistle at short intervals, so that persons on the track may have notice of the approach of engine or cars, and move off the track, and so avoid danger."

(4.) "If the plaintiff has shown to the reasonable satisfaction of the jury that her intestate was killed on the defendant's railroad track, within the corporate limits of the city of Opelika, by defendant's engines while being run through the corporate limits of the city by defendant's employes, it then becomes the duty of the defendant to show reasonably that it was without negligence or fault in the killing of the deceased, or, *if it was guilty of any negligence, that the negligence of the deceased himself contributed proximately to his death.* It either one or the other of these propositions has been shown, the plaintiff can not recover; *but, if neither of them has been shown, it will be the duty of the jury to find for the plaintiff.*"

The defendant excepted, also, to twelve charges given by the court on request of the plaintiff, and to the refusal of thirty charges asked in writing by defendants.

The assignments of error are: (1) "the overruling of the demurrer to each count of the complaint;" (2-7) rulings on evidence, which require no notice; (8) "each of the four parts of the charge of the court excepted to, and especially those portions thereof which are underscored;" (9) "giving each of the twelve charges asked by plaintiff; (10) "refusing to give each of the thirty charges asked by defendant."

HARRISON & LIGON, for appellant.

SAMFORD & CHILTON, *contra*.

COLEMAN, J.—We will consider the case upon the hypothesis that the facts are as contended for by the plaintiff. According to this assumption, Robert Meadors was run over and killed by an engine of the defendant within the corporate limits of the city of Opelika, about 8 o'clock p. m. on the 13th of September, 1888. At the time he was struck by the engine, he was on his way home, walking up the railroad track of the defendant, and within a cut, about twenty feet deep and some four or five hundred yards in length. That behind him, in the direction from where the engine was coming, there were street crossings, and public road crossings, and one not very far from the entrance to the cut; and that deceased came to his death after he had gone about one hundred or one hundred and fifty yards in the

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cut. There were curves in the road, which obstructed the view for less than a fourth of a mile. That the engineer did not blow the whistle, or ring the bell, before reaching the crossing, and did not blow the whistle or ring the bell at short intervals, while moving within or passing through the city, as required by section 1144 of the Code; and that defendant had no head-light. The negligence of the defendant in one or more of these requirements, it is contended, caused the death of the decedent.

Conceding that the proof of these facts shows negligence on the part of the defendant, does the proof, as admitted to be true, show that the deceased was guilty of such contributory negligence as to deprive the plaintiff of the right to maintain this action? There was no city ordinance regulating the speed of trains running within the corporate limits. The duties imposed upon railroads by section 1144 of the Code were intended to protect persons or property rightly at or approaching public crossings of the road, or stopping-places for the trains, but have no application to places or conditions not within its provisions. In the case of the *Ensley Railway Co. v. Chewning*, 93 Ala. 24, it is said: "While a person intending to take a train, awaiting its arrival, should not be regarded as a trespasser, should he merely cross or inadvertently step on the track in the dark, at or about the usual stopping-place; plaintiff, having walked up the track beyond the limits of the usual stopping-place, to meet the train, and having knowingly and voluntarily stepped and stood on the cross-ties, where he was not invited, and had no right to be, must be regarded as a quasi-trespasser, or, as we have said, was guilty of negligence contributing to his own injury." In the case of the *Memphis & Charleston R. R. Co. v. Womack*, 84 Ala. 150, it was declared to be the settled doctrine in this State, supported by the great weight of authority in England and America, that ordinarily the right of way of a railroad company is its exclusive property; free and unobstructed use is essential to the transaction of the business of the company; mere acquiescence in the use of its right of way does not confer on the public a right to use it, nor create any obligation to look out for persons using it, other than the general duty to look-out for obstructions; and that it was not competent to introduce evidence of the custom of people to walk on the track.

When a railroad track runs through parts of a city, town or village which are thickly populated, and where the demands of trade and public intercourse necessitate the fre-

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quent crossing of the track, it is the duty of those operating an engine along the track in such places to keep a look-out. This duty to keep a look-out for persons is not specially imposed by statute, but arises from the likelihood that in such places there are persons on the track, and the bounden duty to duly guard against inflicting death or injury in places and under circumstances where it is likely that injury may result unless care be observed. The duty arises when the circumstances exist which call for its exercise. The mere usage or custom of crossing the track at any particular place does not give rise to the duty to keep a look-out. The population and intercourse of a city, town or village must co-exist with the usage, to the extent that it is likely there are persons upon the track at the particular time or place. We do not think the track of a railroad can be converted into a road for ordinary travel, and one who undertakes to make such use of it becomes a trespasser. This we understand to be the extent of the rule declared in *M. & C. R. R. Co. v. Womack*, *supra*, and in accord with *Go. Pa. R. R. v. Blanton*, *Ib.* 154; and as thus qualified, the case of *S. & N. R. R. Co. v. Donovan*, 84 Ala. 146, is reaffirmed.

Under the evidence as it appears in the record, we do not doubt that, at the time Robert Meadows came to his death, he was a mere trespasser. The neighborhood where he was killed was sparsely settled, as much so as many country neighborhoods. The long cut into which he entered was not used, and could not be used, as a place for crossing the track. Its only use by the public was that of personal convenience for travel as a road, and was not at all necessary for this purpose. When the deceased entered this long, deep cut at night, to use it as a road in going home, he became a trespasser, and was, *per se*, guilty of contributory negligence. Such being the case, under the evidence as it appears in the record, the right of plaintiff to recover is narrowed down to the inquiry, whether the defendant was guilty of reckless, wanton negligence, or intentionally inflicted the injury. Did the defendant discover the danger of plaintiff's intestate in time to avoid the injury by the exercise of due care and exertion, and did it fail to exercise such due care? Such negligence must be shown, to overcome the defense of contributory negligence.

We deem it unnecessary to consider in detail the several assignments of error based upon the charges given and the refusal to charge as requested. The trial court evidently proceeded upon the idea, that the use of the railroad track

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in a city or town as a road for travel was not a trespass, or that the law imposed upon the defendant the duty to keep a vigilant look-out even for trespassers upon its track, so long as it was inside the corporate limits, without regard to population and public intercourse and usage, and without regard to the fact that the deceased was using the track as a road for travel for his personal convenience, at a time and in a place where there was no likelihood that any one would be. This, we have seen, is not a proper construction of the law. The statute requires, in express language, that the engineer shall blow the whistle, or ring the bell, at short intervals, while moving within and passing through a city or town; and we hold this duty is co-extensive with the city or town, as we have explained. The mere failure to comply with these statutory requirements has never been held to constitute more than simple negligence.

Under our system of pleading, under a count for simple negligence, a recovery may be had upon proof of wanton negligence.

The first, second and fourth counts present a good cause of action. The negligence of the defendant is sufficiently averred in each of these counts.—*Mobile & Ohio R. R. Co. v. George*, 94 Ala. 199. Applying the rule, that the pleadings must be construed most strongly against the pleader, the third count is defective. It is averred that the injury occurred in a deep cut of the road. Although in a city, from the description of the place where the injury occurred, *prima facie* we would conclude from all that is stated in the pleadings that the deceased was there without invitation, and was a trespasser. When the pleadings show that plaintiff was a trespasser, he must aver more than simple negligence to authorize him to recover. The negligence must be wanton or reckless, or the injury intentional. The complaint contains no such averment.—*Ensley Railway Co. v. Chewning*, 93 Ala. 24

We have considered only the testimony of the plaintiff, because all the principles of law which govern the case are sufficiently raised by this evidence.

Reversed and remanded.

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[Sims v. Herzfeld.]

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139 176**Sims v. Herzfeld.***Action on Judgment.*

1. *Sufficiency of complaint; amendment.*—In an action on a judgment, properly describing it, additional averments as to the contract on which it is founded, are unnecessary and superfluous; and a count added by amendment, containing a fuller description of the contract, is not a departure, nor objectionable as effecting a misjoinder.

2. *Conclusiveness of judgment.*—A judgment is conclusive of all matters which might have been urged as defenses against its rendition, and such matters are not available in defense of an action on it.

3. *Error without injury in rulings on pleadings.*—Sustaining a demurrer to a special plea, if erroneous, is error without injury, when the record shows that the defendant had the full benefit of the same defense under another special plea, on which issue was joined.

4. *Plea of failure of consideration.*—A plea of failure of consideration, not stating the facts, is demurrable on that account, when not pleaded "in short by consent."

5. *Superfluous averments in complaint.*—If the defendant takes no proper steps to eliminate false issues presented by the complaint, evidence may be received to support them, and they may be submitted to the jury.

APPEAL from the Circuit Court of Tallapoosa.
Tried before the Hon. J. R. DOWDELL.

JNO. A. TERRELL, for appellant.

H. A. GARRETT, and SORRELL & SORRELL, *contra*.

WALKER, J.—1. The suit was upon two judgments alleged to have been recovered by the plaintiff against a partnership of which the defendant was a member. The defendant did not, either by his demurrers or by his pleas, raise the question as to his individual liability upon a judgment against his firm alone. In the count added by the amendment there are allegations in reference to the contracts upon which the judgments were recovered, which are not material to the cause of action upon the judgments themselves. No objection, however, was interposed in any way to the presence in the complaint of these superfluous allegations. One ground of demurrer to the complaint was, that it failed to describe with sufficient accuracy the contract upon which the judgments were rendered. The judgments

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themselves were sufficiently described, and there was no necessity of setting out any description at all of the contracts upon which they were rendered. The complaint as amended was not a departure from the original. The additional count sets out more in detail the cause of action described in the original complaint, but no misjoinder of counts was effected by the amendment. There is no merit in the demurrer to the complaint.

2. If the state of facts set up by the defendant's first plea was ever available as a defense against the claims which had been reduced to judgment, such defense should have been made in the suits in which the judgments were recovered. The judgments are conclusive of all defenses which could have been urged against the demands before the rendition of judgments upon them. The demurrer to this plea was properly sustained.—*Cook v. Parham*, 63 Ala. 456; *Mervine v. Parker*, 18 Ala. 241; 2 Brick. Dig. 145.

3. If there was error in sustaining the demurrer to the second plea, it was error without injury to the defendant; because, under the fifth pl. *v.*, the demurrer to which was overruled, he had the advantage of the same issue which he sought to present by the second plea. He had the full benefit of his denial of the existence of the judgments alleged in the complaint.—*Phoenix Ins. Co. v. Copeland*, 90 Ala. 386; *Capital City Water Co. v. National Meter Co.*, 89 Ala. 401.

4. Even if the plea of failure of consideration was available in an action on a judgment, the plea to that effect in this case was defective in failing to state the facts showing the substance of the matter relied on as a defense.—*Carmelich v. Mims*, 88 Ala. 335. There was no consent to accept the pleas in short.

5. The evidence in reference to the judgments, and to the contracts upon which they were recovered, corresponded with the allegations of the complaint as amended. Some of the allegations were superfluous, as has been already indicated. Some of the evidence which was objected to might have been inadmissible, if immaterial issues had been excluded from the case, or if the defendant had availed himself of objections which might have been made under a different state of the pleadings. The third and fifth pleas, upon which alone issue was joined, were mere denials that the judgments sued on were obtained on notes in which the defendant waived his exemptions, that there was such waiver in said judgments, and that such judgments as were alleged in the complaint were obtained against the partnership of

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Marable & Sims at the August term, 1890, of said court. If no proper steps are taken by the defendant to eliminate false issues presented by the complaint, evidence may be received to support them, and they may be submitted to the jury.—*McKinnon v. Lessley*, 89 Ala. 625; *Allison v. Little*, 93 Ala. 150. The evidence was directly pertinent to the allegations of the complaint, and as it supported them and was wholly uncontroverted, the defendant could not have been injured by the action of the court in giving the general charge requested in writing by the plaintiff.

Affirmed.

White v. Blair.

Action on Promissory Note; New Trial.

1. *New trial; revision of order granting or refusing.*—Under the statute giving an appeal to this court from an order granting or refusing a new trial (Less. Acts 1890-91, p. 779), two rules have been declared, to which the court adheres: (1) when the appeal is from an order refusing to grant a new trial on account of the insufficiency of the evidence, or because the verdict is contrary to the evidence, this court will not disturb the decision, unless, after allowing all reasonable presumptions in favor of its correctness, the preponderance of the evidence against the verdict is so decided as to convince the court that it is wrong and unjust; and (2) when the appeal is from an order granting a new trial, the decision will not be reversed unless the evidence plainly and palpably supports the verdict.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. JESSE M. CARMICHAEL.

H. D. CLAYTON, for appellant.

JERF. N. WILLIAMS, *contra*.

STONE, C. J.—This was a suit by White, transferree, against Blair, on a promissory note alleged to have been made by the latter. The note purports to be payable to T. P. Cawthorn. Defendant interposed a sworn plea denying the execution of the note, which is correct in form.—Code of 1886, p. 796, Form 33. On the trial of the issues, there were verdict and judgment for the plaintiff. Thereupon defendant moved for a new trial on several grounds, which the court granted, setting aside the verdict and judgment. From

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that order, granting a new trial, plaintiff prosecutes the present appeal, under the act "to allow appeals to the Supreme Court from decisions of the City and Circuit Courts in this State, granting or refusing to grant motions for new trials." This act was approved February 16, 1891.—Sess. Acts, 779. Before that time, our statutes made no provision for appeals in such cases. The appellate power conferred on this court by that statute is expressed in its last clause: "to grant new trials, or to correct any errors of the Circuit or City Court in granting or refusing to grant the same." A correct reading of the statute clearly shows that our power is purely appellate, and can not be invoked until motion has been made and acted on in the Circuit or City Court.

The rules for granting or withholding new trials after a verdict has been rendered, are not always expressed in the same terms. Some courts give greater weight to the findings of a jury than others do; or, at least, they seem to do so. We are not inclined to adopt extreme views on either side of this question. We hold that no higher duty rests on a court of original jurisdiction than to assert his manhood, and grant or refuse to grant a new trial, as the merits of the controversy may point out his duty.—*Ala. Gr. So. R. R. Co. v. Powers*, 73 Ala. 244.

The case of *Cobb v. Malone & Collins*, 92 Ala. 630, brought this statute before us for the first time. In that case, as in this, the main ground of the motion was, that the verdict was contrary to the evidence. In that case, the motion had been denied by the trial court, and we were asked to reverse his ruling. We gave the question careful consideration, and declared two rules, which we intended should become a guide and precedent. We said: "The decision of the trial court, refusing to grant a new trial on the ground of insufficiency of the evidence, or that the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions in favor of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust." When the lower court grants a new trial, and the appeal is from that ruling, we said, the decision "will not be reversed, unless the evidence plainly and palpably supports the verdict.

The bill of exceptions in this case is very full. It sets out all the testimony given on the trial in chief, and on the motion for a new trial. We have scrutinized it with care, and fail to find it "plainly and palpably supports the verdict" which the jury rendered.

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The order of the Circuit Court granting a new trial must be affirmed.

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Action for Damages for Killing Cow.

1. *Liability of railroad company for injuries to stock; statutory duties of engineer.*—Under statutory provisions, it is made the duty of the engineer of a railroad train, on perceiving any obstruction on the track, to use all means in his power to stop the train, and, if any stock is killed or injured, the *onus* is on the company to show a compliance with this requirement (Code, §§ 1144, 1147); but this duty does not arise, unless the obstruction is on the track, and is perceived by the engineer; and a compliance with it is not required, when it is shown that the animal was not discovered in time to avoid the injury, and that the failure to discover it sooner was not owing to any want of due care and watchfulness.

2. *Same; general charge on evidence.*—In an action against a railroad company to recover damages for killing stock, proof of the killing makes out a *prima facie* case for the plaintiff, and the sufficiency of the evidence to rebut the presumption of negligence is a question for the jury; hence, the general charge in favor of the defendant is properly refused.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. J. R. DOWDELL.

This action was brought by M. P. Jarvis against the appellant railroad corporation, to recover damages for killing a cow belonging to plaintiff. On the trial, the evidence showed that the cow was run over and killed by a loaded freight train, which was running at the rate of twenty miles an hour; that the animal was carried by the engine thirty or forty feet, and thrown off in a deep cut; and that the place at which this occurred was not in any town or village, nor near a public road crossing. A witness for the plaintiff, who was forty or fifty yards distant from the railroad track, testified that he heard the cattle-alarm sounded, and started towards the track; that he saw several cows on the track "licking salt," and saw one of them run down the track ahead of the engine, but did not see her when the engine struck her; and that the speed of the train was not slackened, nor could he see that any effort was made to check it. The fireman of the train testified, on the part of the defendant, that

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the cow was not one of those feeding or licking salt on the track, but was feeding in a cut on the side of the road, "and was not seen until the engine was within about forty yards of her, when she started down the washout on the side of the cut, in the direction of the track; that the engineer, as soon as she was or could be seen moving towards the track, sounded the cattle-alarm, reversed his engine, put on brakes, and used every appliance at his command to stop or check the speed of the train, or frighten the cow away; that the train was so heavy, and running so fast, that the wheels slipped, and the speed was checked but little; and that the train could not have been stopped in less than four hundred yards." On this evidence, the defendant excepted to a charge given by the court, and to the refusal of two charges asked. These charges are set out in the opinion of this court, and present the only matters assigned as error.

GEO. P. HARRISON, for appellant, cited *Railroad Co. v. Hembree*, 85 Ala. 481; *Railroad Co. v. Deaver*, 79 Ala. 216; *Railroad Co. v. McAlpine*, 80 Ala. 73; *Railroad Co. v. Caldwell*, 83 Ala. 196.

CLOPTON, J.—The statutes provide that the engineer, on perceiving any obstruction on the track of a railroad company, must use all the means within his power known to skillful engineers, such as applying brakes and reversing engine, in order to stop the train; and also, when stock is killed or injured, the burden of proof is on the company to show a compliance with this statutory requirement.—Code, §§ 1144, 1147. The duty, however, to apply the brakes and reverse the engine does not arise, unless the obstruction is on the track, and perceived by the engineer.—*East Tenn., Va. & Ga. R. R. Co. v. Bayliss*, 77 Ala. 428.

In a suit against a railroad company for injury to stock, proof of the mere fact that the stock was killed by a moving train casts, under the statutory provisions, the burden on the company to acquit itself of the negligence presumed by the law in such cases; and unless the burden is lifted, entitles the plaintiff to a verdict. Notwithstanding, under a literal construction of its imperative and unqualified terms, the statute may be regarded as commanding observance of the statutory requirement in all cases, and under any circumstances, where an obstruction is perceived on the track, it has been repeatedly and uniformly construed not to exact strict observance, when there is no reasonable possibility of averting the disaster by any amount of diligence—such a
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contingency being considered without the reason, spirit and policy of the statute. Under this construction, the presumption of negligence, arising from the fact of injury, is overcome, when the defendant shows that the failure to discover the obstruction sooner was not owing to a want of care and watchfulness, and that when discovered the use of all means known to skillful engineers would have been powerless to stop the train in time to prevent a collision. *M. & G. R. R. Co. v. Caldwell*, 83 Ala. 194; *E. T., V. & G. R. R. Co. v. Deaver*, 79 Ala. 216; *A. G. S. R. R. Co. v. McAlpine*, 80 Ala. 73.

In the general charge, the court instructed the jury: "That the burden was on the defendant to show a compliance with the requirements of the statute, as to reversing the engine and applying the brakes, after discovering or seeing the cow on the track." There was testimony tending to show that the cow, being in a wash in a cut, was obscured from view, and was not, and could not have been discovered, until she ran from the wash on the track, about forty yards in front of the engine, and that when discovered reversing the engine and applying the brakes could not possibly have prevented the injury. If these be the facts, the engineer need not attempt to stop the train; and if satisfactorily shown, defendant is not required to show a compliance with the requirement of the statute as to reversing the engine and applying the brakes; the defense is complete without showing such compliance. When referred to the evidence, and construed in connection with its tendencies, the proposition of the charge implies, that it was the duty of the engineer to reverse the engine and apply the brakes on perceiving the obstruction, though the cow suddenly ran on the track in such close proximity to the engine, as to leave no room for a reasonable possibility of avoiding a collision by the use of all the means in the power of the engineer. The charge may assert a correct general proposition; but, when applied to each phase of the facts which the evidence tended to show, it is incomplete in that it ignores and draws from the consideration of the jury the testimony tending to show that, without fault on the part of those in charge of the engine and train, the cow was not, and could not have been discovered, until no skill or diligence could have prevented the disaster.

In *N., C. & St. L. R. R. Co. v. Hembree*, 85 Ala. 481, the charge given at the instance of the plaintiff was as follows: "If the jury are reasonably satisfied that plaintiff's mare was killed by defendant's train, at the time alleged, then,

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unless defendant has reasonably satisfied them that its agents or servants in charge of the train did all in their power to avoid the killing, they must find for the plaintiff;" substantially asserting the same principle as the charge under consideration, except that the latter requires specific proof of compliance with the requirements of the statutes in particular respects. In view of the testimony, the charge was held to be erroneous. It is said: "Engineers are not required to do all in their power, nor to do anything, when it is manifest that nothing they can do can possibly prevent the injury. The charge would have been correct, if it had contained this additional clause: 'Unless the jury are reasonably convinced that there was no fault in not sooner discovering the mare, and that when discovered no amount of diligence could have prevented the collision.'" A similar qualifying clause would have rendered the charge we are considering complete and correct.

The charge asked by defendant, in the following language, "If the jury believe from the evidence that the animal came down the side of a cut from behind an obstruction about forty yards in front of the approaching train, they must find for the defendant," is too meager. That the engineer could not have sooner discovered the cow, because of the obstruction, should have been embraced in the hypothesis.

The affirmative charge requested by defendant was properly refused. Plaintiff, having proved the killing, made a *prima facie* case of negligence, which called for rebuttal. On the entire evidence, whether the presumption of negligence was satisfactorily rebutted, was a question for the jury.

Reversed and remanded.

Central Railroad & Banking Co. v. Ingram.

Action for Damages for Injuries to Mules.

1. *Liability of railroad company for injuries to stock; general charge on evidence.*—In an action against a railroad company to recover damages for injuries to several mules, which were run over by a freight train before daybreak one frosty morning, as the train was crossing a trestle over a small creek, the defendant is entitled to the general affirmative charge on the evidence, when the engineer of the train testifies that

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he did not see the animals until he was within ten feet of them, and could not see them sooner because of a dense fog, about one hundred yards wide, which covered the track at that point, extending up and down the creek; there being no evidence in conflict with his testimony, and none which authorized an inference inconsistent with it.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. JESSE M. CARMICHAEL.

This action was brought by Charles E. Ingram against the appellant corporation, to recover damages for injuries to a number of his mules, fourteen of which were killed, and several others crippled and injured, by one of the defendant's freight trains, on the morning of November 28th, 1890. The accident occurred between three and four o'clock in the morning, an hour or more before daybreak, at a trestle or short bridge which spanned Dry Creek; and the evidence showed that the night was star-lit, and the morning frosty. The defendant asked the general affirmative charge on the evidence, and the refusal of this charge is assigned as error.

NORMAN & SON, for appellant, cited *Long v. McDougald*, 23 Ala. 413; *Belisle v. Clarke*, 49 Ala. 98; *Hall v. Posey*, 79 Ala. 89; *Ala. Gold L. Ins. Co. v. Mobile L. Ins. Co.*, 81 Ala. 331; 87 Ala. 309.

JOHN V. SMITH, *contra*, cited *Railroad Co. v. Jones*, 71 Ala. 495; *Railroad Co. v. Perry*, 87 Ala. 392; *Railroad Co. v. Smith*, 90 Ala. 25.

McCLELLAN, J.—The general affirmative charge was asked by the defendant below and refused. The only exception reserved goes to that action of the trial court. The correctness of the ruling confessedly depends upon whether any evidence was adduced in conflict with, or which afforded an inference inconsistent with, the testimony of the engineer, that the immediate locality of the casualty was so enveloped in a dense wall of fog as that it was impossible to see plaintiff's mules until too near them to avoid colliding with and killing them. This fog-wall, he says, arose from the bed of a creek along which was timber, was scarce an hundred feet thick, and extended across the track. This testimony is not, we apprehend, unreasonable in itself; but, if so, the jury would have been free to disregard it, under the charge requested and refused. So, too, with respect to supposed contradictions in other parts of this witness' testimony; the giving of the charge asked would not have

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prevented the jury, had they seen proper, from discrediting the witness as to the existence of fog, and finding for the plaintiff, since the instruction was that they should find for defendant only in the event they believed all the evidence. The sole question, we repeat, therefore is, was there any evidence inconsistent with the testimony of the engineer as to the existence of the fog at the time and place of the casualty? Certainly neither the fact that the night was clear and star-lit—the accident occurred a little after 3 o'clock A. M.—or that the dawn was fair and bright, is at all inconsistent with the theory of the existence of a fog-wall at that particular point; for it is common knowledge, that fogs of this character, arising from water-courses, usually, if indeed not always, occur only during very clear nights. Nor do we conceive that the testimony of the witness Smith affords any basis for an inference to be drawn by the jury that the engineer was mistaken as to the fog. Smith was three-fourths of a mile away. It was night. It does not appear that his attention was at all directed to the point of the alleged fog. If it had been, it is not reasonable to suppose that he would at that distance, and at that time, have detected the wall of fog hanging over the bed of the creek, and among the trees which lined its banks. It is common knowledge that such fogs, “after depositing a heavy dew, lie still in the valleys,” over the water and damp ground from which they are exhaled; and it would have been singular, under the conditions shown by the evidence, if there had been any traces of fog at the place where Smith was. The evidence does not inform us how many creeks, swamps and the like this train had passed over on that night; but the engineer testified he had passed through a similar fog at Uchee Creek; and for aught that we can know, this was the only other point on the line traversed by the train which afforded the same aqueous and atmospheric conditions that existed at the point of the accident. So that we are unable to conceive how the fact that fog existed elsewhere only at Uchee Creek, could afford any inference that it did not exist at the place in question.

Another matter relied on to sustain the court's action is the testimony of the fireman. This witness testified as to the fog only this: “I can not say there was any fog that night.” This could mean no more than that the witness did not know at the time of the trial whether there was a fog at the time and place inquired about. How this ignorance arose, why he is unable to say that there was a fog, he does not undertake to inform the jury, as we construe his testimony.

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mony. It may be that his attention was not on the alert, and hence he did not know at the time whether there was a fog. Or it may be that he knew at the time that there was or that there was not such fog as the engineer deposed to, and has since forgotten what was the real fact in that connection. However that may be, one thing is certain: he neither affirms or denies the existence of the fog, directly or inferentially; and his evidence can not in any just sense be said to corroborate or contradict that of the engineer, or to afford any basis for a legitimate inference in line with or inconsistent with the latter's testimony. Manifestly, the jury might have given full credence to every fact deposed to by the fireman, and full force to every inference deducible from his evidence, and yet have implicitly believed all that was deposed to by the engineer in respect of the existence of a dense fog at the place of the casualty. So far as the testimony of the fireman is concerned, therefore, the general charge requested should have been given.

There is no evidence in this record that any of the mules were stricken elsewhere than at the point which the engineer swears was enveloped in the fog. No indications of a collision at any other point are deposed to. All the animals which were killed outright, were found at that place. Several hours afterwards, one of the mules which had been wounded in the collision was found on the track at another place a short distance from this, in the direction from which the train came. That it had gone to that place after the train passed, is manifest from the fact that it was found on the track, where it could not have remained and lived while the train was passing; and that it might have come from the place where the other mules were killed is demonstrated by the fact that it was still able to move about and was driven off the road. In the absence of any evidence of a collision at the point where this mule was found, it would be unreasonable to allow any inference under the circumstances to be drawn that it was stricken at that place. This fact, like the other circumstances to which we have alluded—and this and those others constitute all the evidence relied on to afford an inference inconsistent with the evidence of the engineer—affords nothing contradictory of, or inconsistent with the evidence for the defendant, which went to show that its employes were without fault in respect of the occurrence; and the jury should have been instructed, as requested, that if they believed all the evidence in the case they should find for the defendant.

Reversed and remanded.

[Mathis v. Carpenter.]

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99 88**Mathis v. Carpenter.***Motion for Summary Judgment against Sheriff and Sureties.*

1. *Appointment of deputy by sheriff, and proof thereof; filing oath of office.*—A sheriff may be held liable for the default of a third person as his deputy, although he denies the fact of appointment, on proof of the performance of official acts by the person claiming to be a deputy, with his knowledge and in his presence, and his subsequent recognition of such acts; and the fact that the deputy's oath of office was filed in the office of the clerk of the City Court, instead of the judge of probate (Code, § 253), does not affect the question of the sheriff's liability for his official acts.

2. *Official bonds of sheriff as evidence.*—In an action (or summary proceeding) against a sheriff and the sureties on two official bonds given by him, pleas being filed by all of the defendants jointly, the bonds can not be excluded from the jury as evidence because two of the sureties on the first bond were not on the second.

3. *Bond of indemnity, as justifying or requiring levy.*—When an attachment is placed in the hands of a sheriff to be levied, a bond of indemnity given, and property pointed out which is *prima facie* subject to levy, he may nevertheless refuse to make the levy, if he is satisfied that the property is not liable; but proof of these facts makes out a *prima facie* case of liability against him, and imposes on him the *onus* of proving that the property was in fact not subject to levy.

APPEAL from the City Court of Anniston.

Tried before the Hon. B. F. CASSADY.

This was a motion by G. H. Mathis against L. P. Carpenter as sheriff, and Wiley Carpenter, W. M. Hyatt, J. F. DeArman, J. B. Palmer, J. C. Watson, and Jas. E. Watson, as sureties on his official bonds; and was commenced on the 5th July, 1890. The cause of action was the sheriff's failure to levy an attachment, which the plaintiff had sued out against one C. Roberts, his tenant, on certain goods, furniture and effects in the rented house, and which were pointed out to him as subject to levy, and a bond of indemnity given to procure the levy. The attachment was sued out on the 7th December, 1889, for the unpaid rent of a dwelling-house, and was placed in the hands of one C. F. Porter, as a deputy of the sheriff, to be levied; but no return of its levy, or failure to find property subject to levy, was ever made. Carpenter, the sheriff, denied that he had ever appointed Porter as his deputy, and Caldwell, his principal deputy, testified that he had appointed Porter "on his own account;" while the plaintiff adduced evidence of repeated official acts performed by him as deputy, and the sheriff's recognition of them. The plaintiff offered in evi-

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dence the oath of office as deputy taken by Porter, but the court excluded it as evidence, because it had been filed in the office of the clerk of the City Court, instead of the judge of probate; to which ruling the plaintiff excepted. The sheriff had executed two official bonds, the first being signed by all of his six co-defendants as sureties; and the other, which was required at the instance of DeArman and Palmer, who asked to be discharged from further liability, was signed by the other four defendants. The plaintiff offered both of these bonds in evidence, but the court excluded the first, on objection by the defendants, "on the ground that it had ceased to be the official bond of said Carpenter before the commencement of said attachment suit;" to which ruling plaintiff excepted. Roberts, the defendant in attachment, was allowed to testify, against the objection and exception of the plaintiff, that he had no property which was subject to levy under the attachment; and he further testified, that the furniture in his house belonged to his wife, and that he paid Porter \$25 not to remove it under the levy. It was proved that Porter had absconded. This being "substantially all the evidence," and a jury having been waived, the court rendered judgment for the defendants. The plaintiff appeals, and assigns as error the judgment of the court and the several rulings on evidence above stated.

MATTHEWS & WHITESIDE, for appellant.

CALDWELL & JOHNSTON, *contra*.

COLEMAN, J.—Appellant as plaintiff moved for a summary judgment against the defendant Carpenter, as sheriff, and his sureties, for failing to levy an attachment. The averments of the motion are, that the writ of attachment was placed in the hands of the sheriff, property pointed out to him as belonging to the defendant in attachment, and that the sheriff was duly indemnified to make the levy. The defendants' pleas were three in number: 1st, that the writ was not received by him, or any one authorized to receive it; 2d, that defendant had no property subject to levy under the attachment; and, 3d, the same could not have been executed by the exercise of due diligence.

The proof is ample to show that the sheriff, Carpenter, was liable for the acts of C. F. Porter as his deputy. The testimony of the clerk of the court showed that Porter acted as the deputy-sheriff in the presence of the sheriff; that he was in the habit of receiving all kinds of process; that in

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fact he receipted for executions in the name of the sheriff, by him as deputy, collected money on executions, made due return of the collections in the name of the sheriff, and was generally understood to be the deputy-sheriff. To the same effect is the testimony of certain attorneys, who practiced in the court; and in regard to the particular writ of attachment, upon inquiry being made of Caldwell, whom the sheriff acknowledges to have been his regular deputy-sheriff, was referred by him to Porter as the officer who had the writ for execution. There is other evidence, also, sufficient to satisfactorily show that Porter was recognized by the sheriff as his deputy.

The pleas are framed jointly for all the defendants, and there is no plea which justified the exclusion of either bond executed by the sheriff, although some of the defendants were sureties upon one bond, who were not sureties upon the other.

Section 3951 of the Penal Code imposes a penalty upon any officer required by law to file an oath of office, who enters upon the duties of his office without first taking and filing such oath in the proper office. The fact that Porter filed his oath of office with the clerk of the court, instead of the probate office, did not relieve the sheriff of his liability for the acts of Porter as his deputy, if the evidence otherwise satisfactorily showed that he, Porter, represented himself as deputy-sheriff, and acted as such with the knowledge and consent and approbation of the sheriff; and if the evidence is credible, there can be but little question of the existence of these facts.—*Joseph v. Cawthorn*, 74 Ala. 414.

That property in the possession of the defendant, apparently subject to levy, was pointed out, and an indemnifying bond executed to the sheriff, is fully proven. The witness Roberts, the defendant in the attachment suit, testified that in fact the attachment was levied by the deputy-sheriff, so far as to take control of the property, and for a consideration of twenty-five dollars paid to the deputy by him the possession was released; but there was no entry of any levy entered on the writ of attachment or elsewhere.

The second and third pleas presented a good defense to the action.

An indemnifying bond is intended for the protection of the officer. Under our statute, no additional duty is imposed upon the officer because he has been indemnified. A bond of indemnity does not devolve upon a sheriff to commit a trespass, or do an illegal act. In no event can it do more than shift the burden on him to show that the prop-

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erty was not subject to levy. The evidence showed that the debt upon which the attachment issued was for rent of a dwelling, and the property pointed out was furniture in the rented house apparently in the possession of the tenant. *Prima facie*, the officer was liable for not making the levy, but he was not absolutely liable. If the property did not belong to the tenant—if it was not subject to levy by attachment—the plaintiff suffered no injury, and sustained no damage. Under the facts proven by the plaintiff, *prima facie* the property was liable, and the burden rested upon the sheriff to prove his defense, by showing that the property was not subject to levy under the attachment.—*Mason v. Watts*, 7 Ala. 705; *Leavitt v. Smith*, *Ib.* 181; *Winter v. Bigelow*, 9 Por. 483; *Smith, Stewart & Co. v. Castellow*, 88 Ala. 355; *Abbott, Downing & Co. v. Gillespy*, 75 Ala. 184; *Williams v. Strobach*, 59 Ala. 493; *Governor v. Campbell*, 17 Ala. 569. There was no error in admitting such testimony.

Section 12 of the act establishing the City Court of Aniston (Acts of 1888-9, p. 569) provides that, in cases of appeal, if there be error, the Supreme Court shall render such judgment as the court below should have rendered, or reverse and remand the same for further proceedings, as shall be deemed right. Although there is proof tending to show that the property pointed out to the sheriff may not have been subject to levy under the attachment, the real contest seems to have been rested upon other grounds. The rulings of the trial court were not in accord with the principles here declared, and we are of opinion that the ends of justice would be better promoted by a reversal of the case.

Reversed and remanded.

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Statutory Action in nature of Ejectment.

1. *Exclusion of deed as evidence, or record thereof; presumption in favor of judgment.*—When a deed is offered in evidence, or the record thereof, and is excluded, but the ground of objection is not stated, and the paper itself is not set out in the bill of exceptions, this court will presume that it was properly excluded.

2. *Proof of title under mortgage.*—When the defendant in ejectment claims under a conveyance from a mortgagee of the plaintiff, but fails to produce his deed, or otherwise connect himself with the mortgagee's title, he can not complain of the exclusion of the mortgage as evidence.

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3. *Proof of identity of lands sued for; general charge on evidence.* When the lands sued for are described in the complaint only by their government numbers and subdivisions, and, the plaintiff producing no paper title, his witnesses testify to his prior possession of "the upper place" and "the lower place," not identifying them as the lands sued for, the court is not authorized to give the general charge in his favor, although no objection was made by the defendant to the relevancy or sufficiency of the evidence.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. JOHN B. TALLY.

This action was brought by Moses B. Keel, to recover the possession of a tract of land containing 480 acres, which was described in the complaint by its government numbers, being subdivisions of sections 17, 32, and 33, in township four (4), range three (3) east, in Jackson county; and was commenced on the 21st July, 1890. F. W. Dunton intervened as the landlord of the tenants in possession, and defended the suit on his own title, issue being joined on the plea of not guilty. On the trial, the plaintiff reserved a bill of exceptions, in which the facts are thus stated:

"The plaintiff introduced R. L. Butler as a witness, who testified that he had known plaintiff six or seven years; that plaintiff was in possession of the upper place, from the time witness first knew him until defendant entered, and had been in possession of the lower place ever since he bought the same from Silas Kennamer four or five years ago. Plaintiff then introduced John Wilson as a witness, who testified, that plaintiff had been in possession of the upper place about fifteen years, and of the lower place four or five years; that he got the lower place from Silas Kennamer, part of the upper place from the widow M., and the other part from his (plaintiff's) father's estate. Witness did not know what was the reasonable rental value of the lands; had heard that Jenkins paid about \$300 rent for the upper place; did not know the rental value of the lower place; that the annual rent of the upper place was worth \$300, but he did not know what the lower place was worth. Defendant then offered in evidence the record of a deed to him from the *American Mortgage Company of Scotland, Limited*. Plaintiff objected to said record as evidence; which objection the court sustained, and the defendant excepted. Defendant offered in evidence, also, the record of a mortgage executed by plaintiff to said *American Mortgage Company of Scotland*, which is in book of mortgages No. 14, pp. 531-34, and is as follows," setting it out: "Plaintiff objected to said record as evidence, and moved to exclude the same. There-

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upon, defendant's counsel stated to the court that defendant claimed through said mortgage, under a deed the record of which was offered above, and that the original mortgage was not in the custody or control of the defendant. The court sustained the objection, and excluded the record of said mortgage; and defendant excepted. This being all the evidence, the court charged the jury, on request, that they must find a verdict for the plaintiff, if they believed the evidence." The defendant excepted to this charge, and he here assigns it as error, together with the rulings on evidence above stated.

MARTIN & BOULDIN, for appellant.—(1.) The record of the mortgage was improperly excluded as evidence. It was a necessary link, in fact the first link, in the chain of the defendant's title; and he could not make out his defense without it. It was not in his possession, but was presumptively in the possession of the mortgagee.—*Florence Land Co. v. Warren*, 91 Ala. 533. The record was legal evidence of the mortgage itself.—Code, § 1798; *White v. Hutchings*, 40 Ala. 253; *Huckabee v. Sheppard*, 75 Ala. 342. (2.) There was no evidence identifying the "upper place" and the "lower place," mentioned by the witnesses, as the lands sued for, nor even showing that they were in Jackson county. The evidence, for this reason, did not authorize the general charge.—*Acklen v. Hickman*, 60 Ala. 568; cases cited in 1 Brick. Digest, 871-2, §§ 964-5; 3 *Id.* 434, §§ 405, 411-12, 414, 417.

J. E. BROWN, *contra*.—(1.) The record of the deed was properly excluded as evidence, because the absence of the deed itself was not accounted for; and the record of the mortgage was properly excluded, because the plaintiff did not connect himself with it.—47 Ala. 175, 637. (2.) The lands were described in the complaint by their government numbers and subdivisions; and they consist, as this court must judicially know, of two tracts of 240 acres each, located on the river, and two miles apart.—*Mooney v. Turnipseel*, 50 Ala. 499; *Walker v. Allen*, 72 Ala. 455. The complaint was before the jury, and the testimony was referable to it. If the "upper place" and the "lower place," mentioned by the witnesses, were not the lands sued for, the evidence was entirely irrelevant; and its relevancy was admitted by the failure to object to it.

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WALKER, J.—This is a statutory action in the nature of ejectment for the recovery of the possession of land and damages for the detention thereof. The plaintiff undertook to sustain his case by proof of prior actual possession under a claim of ownership. The defendant offered in evidence the record of a deed to himself from the American Mortgage Company of Scotland, Limited, and also the record of a mortgage from the plaintiff and his wife to that company. In offering the record of the mortgage the defendant's counsel stated that he claimed through said mortgage under the deed which had been already offered in evidence. On objection interposed by the plaintiff, the court excluded the records of both the deed and the mortgage. The record of the deed which was excluded is not copied in the bill of exceptions. We are not informed in any way of its contents, nor does the record disclose upon what ground it was excluded. In the absence of any showing to the contrary, we must presume that it was properly excluded.—*Hutcheson v. Powell*, 92 Ala. 619; *Beadle v. Davidson*, 75 Ala. 494.

The exclusion of the deed left the defendant in the position of failing to connect himself with the title under which he claimed. The deed was the link connecting him with the title conveyed by the mortgage. The defendant could not set up the outstanding title of the mortgage without connecting himself with it (*Allen v. Kellam*, 69 Ala. 442), and could not be injured by the exclusion of a mortgage to a third party standing in no relation of privity with him. His privity with the mortgagee, or the title conveyed by the mortgage, was proposed to be shown only by the deed, the proof of which had already been rejected, and properly so, we must presume. The mortgage, without the deed, would not tend to show the record title under which defendant proposed to hold the land, and no injury could result to him from the exclusion of the mortgage alone, as he failed in the proof of the deed. For this reason there can not be a reversal because of that ruling, however insufficient may have been the grounds suggested in support of it.

The complaint describes the lands sued for only by the numbers of section, township and range. The plaintiff offered evidence only as to his prior possession of "the upper place" and "the lower place," and as to the rental value thereof. All the evidence is set out in the bill of exceptions, and we find nothing at all in the record tending to show that the lands referred to by the witnesses are the identical lands described in the complaint. The witnesses

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do not in any way locate the lands of which the speak. It is not made to appear that there is any correspondence between the proof and the plaintiff's pleading. For aught that appears the testimony may have referred to other lands than those sued for. It certainly can not be affirmed that the proof clearly showed that the plaintiff was entitled to, or had had prior possession of the land described in the complaint. The Circuit Court erred in giving the general charge in favor of the plaintiff. To say the least of it, the evidence was not sufficiently clear and free from doubt to warrant that charge.—*Tabler v. Sheffield Land, Iron & Coal Co.*, 87 Ala. 305; *Alabama Gold Life Ins. Co. v. Mobile Mutual Ins. Co.*, 81 Ala. 329.

Reversed and remanded.

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Action by Attorneys-at-Law, on Contract of Employment.

1. *Contract of employment of attorneys; see contingent on success.*—Attorneys having been employed by a voluntary association of persons engaged in the business of selling liquor by retail in a precinct in which a local prohibitory law or ordinance had been enacted, to represent any of them in their efforts to obtain a license; \$250 being paid in cash, and \$250 to be paid "whenever a license to sell liquor is obtained, or can be obtained in said precinct;" and having failed in their attacks on the law, in the several cases in which they appeared for their clients, can not recover the unpaid \$250 because the law was afterwards held void in a prosecution against a person who has not a member of the association, and for whom they did not appear as counsel.

APPEAL from the City Court of Anniston.
Tried before the Hon. B. F. CASSADY.

GORDON MACDONALD, for appellants.

KELLY & SMITH, *contra*.

STONE, C. J.—The claim set forth in the two counts of the complaint is substantially as follows: The Anti-prohibition Society of Anniston, a voluntary association of the persons sued in this action, employed Kelly & Smith, attorneys, to represent them, or any member of the society, in an effort to procure a license to retail spirituous, vinous, or

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malt liquors in precinct No. 15, Calhoun county, the precinct in which Anniston has its *situs*. The attorneys were to represent the applicants for license in any and all courts, that might become necessary in the attempt to obtain such license. The fee to be paid Kelly & Smith was \$250 cash, and \$250 to be paid whenever a license to sell liquor is obtained, or can be obtained in said precinct." The cash payment was presently made. This suit is for the deferred payment, and the complaint avers "that a license issued authorizing the sale of spiritous, vinous and malt liquors in Anniston as early as September 15, 1890."

Whether the police jurisdiction of Anniston extends and includes the whole of precinct No. 15, is not shown. It may admit of question whether the establishment of a right to obtain a license to retail within the city of Anniston, is a compliance with the agreement to establish such right in precinct No. 15. We will not decide this question, as we prefer to place our ruling on a different ground.

The proof shows the defendants executed no writing. The testimony most favorable to plaintiffs shows that two persons, being a majority of a committee of three, representing a voluntary association consisting of a larger number of persons, and known as the "Anti-prohibition Society of Calhoun county," entered into an oral agreement with the attorneys, engaging their services to represent the association in certain matters of prospective litigation. Plaintiffs aver that the event has happened or transpired, on which the second payment was to become due and demandable, and on this they base their right of recovery.

The plaintiffs, at the time of the retainer, executed a receipt, acknowledging the payment to them of two hundred and fifty dollars, specifying the professional services they bound themselves to render, and naming the event or condition on the occurrence of which the promise to make the second payment depended. It is stated in the receipt that "said Anti-prohibition Society of Calhoun county, Alabama, have this day employed Kelly & Smith as their attorneys to represent their interest in precinct No. 15 of said county (Anniston), and make such application to the Probate Court as may be necessary to thoroughly test the right to procure license to sell liquor in precinct No. 15, and to secure such license, if the same can be legally done; and to represent such applications on appeal or otherwise, as may be necessary, either to Supreme Court, Circuit Court, or City Court, one or all, as may be necessary, until it is ascertained whether license can be secured or not.

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. . . Terms of employment, \$250.00 cash, the receipt of which is acknowledged, and \$250.00 to be paid whenever a license to sell liquor is obtained, or can be obtained in said precinct." This receipt was put in evidence by plaintiffs, for the purpose of proving the terms of the retainer.

It was proved, and not denied, that Kelly & Smith did render professional services in endeavoring to procure a license to retail liquors in said precinct—particularly in the case of *Olmstead v. Crook*, 89 Ala. 228—but in all their efforts they were unsuccessful. In the later case, *Ex parte Mayor*, 90 Ala. 516, it was decided by this court that there was no statute authorizing the city council of Anniston to enact an ordinance prohibiting sales of liquors in said city, but that they could only regulate such sale by license. We therefore decided that the prohibition ordinance adopted by the city council was in excess of its authority, and was invalid. The result of this decision was to open up the way for obtaining a license to retail liquors in the city of Anniston.

The case last referred to—90 Ala. 516—arose in the matter of Mrs. Untreiner's conviction for violating the prohibition ordinance of the city of Anniston. She was not a member of the Anti-prohibition Society of Anniston, and had nothing to do with its plans and purposes. She was an outsider, and Kelly & Smith neither represented her in that litigation, nor did the Anti-prohibition Society, or any of its members, so far as we are informed, request them to do so. They were not of counsel in the case.

As we understand the contract of retainer in this case, as evidenced by the written receipt, the professional services to be rendered by the attorneys were the consideration—the only consideration—which purported to uphold, and could uphold the promise. Without such services, or the agreement to render them, the promise had no consideration, and would not maintain an action.—Bish. on Con., enlarged ed., §40; *Hamlin v. Wheelock*, 42 Hun (N. Y.), 530. And the promise to pay being made contingent on success, it was not enough that services should be rendered. They must have been successfully rendered, to entitle the plaintiffs to the additional two hundred and fifty dollars. To test this: When the plaintiffs had rendered all the professional services they claim to have rendered, the right to obtain a license to retail liquors in Anniston had not been established. If no proceedings had been taken after that time, and matters had remained in *statu quo*, no one would contend the present action

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could be maintained. A complete answer to such suit would be, that the promise to pay was conditional, and the condition had not been complied with. Now, all that was subsequently done, and which it is claimed is a performance of the condition, was done by another, and neither the plaintiffs nor defendants in this suit had any participation therein. So far as they were or are concerned, it was the merest accident. It was not a performance of the condition on which the payment of the second two hundred and fifty dollars was made dependent.

The judgment of the City Court is reversed, and, rendering the judgment that court should have rendered, it is ordered and adjudged that the defendants go hence, and recover of plaintiffs the costs of this suit in the court below and in this court.

Reversed and rendered.

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Statutory Detinue by Mortgagor against Mortgagee.

1. *Tender of mortgage debt after default, but before possession taken, and payment of money into court.*—A tender of full payment of the mortgage debt after default, but before the mortgagee has taken or demanded possession of the property for the purposes of foreclosure, if kept good, and the money brought into court, discharges the lien of the mortgage, and extinguishes the title of the mortgagee; and on proof of these facts, the mortgagor may recover the property from a purchaser at a subsequent sale under the mortgage.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. S. H. SPROTT.

This action was brought by B. S. P. Moore against John Maxwell and Richard Maxwell, to recover a mule, with damages for its detention; and was commenced on the 27th April, 1889. The defendants filed several pleas, and among them the following: "(B.) Defendants say that they purchased said mule at a sale under a certain mortgage made by plaintiff to R. Maxwell, Sons & Company; that they were *bona fide* purchasers at said sale, and were the legal owners of said mule at the commencement of this suit." "(5.) That the defendants own and are possessed of the property sued for; that the same was conveyed to them by a certain mortgage executed by plaintiff to R. Maxwell, Sons & Co., a

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partnership of which defendants are members, which mortgage has been regularly foreclosed, and the property sued for purchased by defendants." "(6.) That defendants are the owners of said property; that said property was conveyed to R. Maxwell, Sons & Company, a partnership of which they are members, by a certain mortgage executed by plaintiff to said R. Maxwell, Sons & Company, which mortgage has been regularly foreclosed; and that R. Maxwell, Sons & Company purchased said property at said foreclosure sale."

To these three pleas plaintiff filed replications as follows: (1.) "That defendants acquired no title at the said mortgage sale, because said mortgage debt had been paid off and discharged by a tender of the amount remaining due upon the debt secured by said mortgage, said tender being made prior to the property sued for being taken possession of by the mortgagees (the defendants herein); and that said tender has been kept good, and is still kept good, the tender of the amount remaining due on the mortgage debt being now on deposit in the hands of the clerk of the court." (2.) "Defendants, by a verbal contract, extended the law-day of the mortgage mentioned in plea *B*; and upon demand, and before the mortgaged property had been taken in possession by defendants, plaintiff tendered to them the amount remaining due upon said mortgage debt, with interest; that notwithstanding said tender, and the fact that said tender has ever since been kept good, defendants wrongfully and unlawfully wrested the possession of said property from the possession of the plaintiff, and have ever since wrongfully detained the same." (3.) "That the amount of the debt secured by the mortgage mentioned in said plea *B* was fully paid off and discharged by a tender in money of the amount due thereon, with interest; and that said tender is still kept and made good; and that such tender was made to the defendants prior to their taking possession of the personal property herein sued for."

To these replications the defendants filed demurrers, as follows: (1.) To the first replication, (1) because the same, while claiming a payment of the mortgage debt, fails to allege that said payment was made before or at the maturity of the debt, or the arrival of the law-day of the mortgage; (2) because, while said replication attempts to allege payment, it claims and alleges that said payment was made by a tender of the amount, which, if true, would not amount to payment; (3) because, if all the matters stated in said replication were true, it would be no answer to the plea, and would

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not entitle the plaintiff to recover in this action." (2.) "To the second replication, (1) because the same seeks by parol testimony to contradict the terms of a written instrument: because said replication alleges that these defendants, by verbal contract, extended the law-day of said mortgage, which is shown to be without any consideration, and absolutely void; further, because said replication does not show or allege that said tender was made before the maturity of the debt, or the law-day of the mortgage, even as claimed to be extended; hence, if said allegation be true, it is no answer to the plea, nor would the plaintiff be entitled to recover; and further, because said replication alleges that defendants unlawfully and wrongfully wrested the possession of the property from the plaintiff, because that is not a subject of inquiry in this suit—it is only the wrongful detention of the property which is the question in this suit."

The court overruled each of these demurrers, and these rulings are the only matters assigned as error.

WOOD & MAYFIELD, for appellants.

FITTS & SOMERVILLE, *contra*. (No briefs on file.)

CLOPTON, J.—The principal question involved in the special pleas, replications, and demurrers to the replications, is, whether a tender of the amount due on a mortgage of personal property, after condition broken, operates, when kept good, to discharge the lien of the mortgage, and re-vest the title in the mortgagor, so that he may maintain an action of detinue against the mortgagee, who has taken possession after tender made, sold the property under the mortgage, and purchased at the sale. The contention of appellants is, that, as mortgages are governed in this State by the principles of the common law, a tender can not effectually extinguish the lien, unless made at the time of payment fixed by the contract of the parties—an offer of strict performance of the condition.

In those States where mortgages are regarded as a mere lien or security for a debt, and the title as remaining in the mortgagor until divested by foreclosure, the rule generally adopted is, that a tender at any time during the continuance of the right of redemption is the equivalent of payment as to things incidental and accessorial to the debt, and extinguishes the lien of the mortgage, though the tender is not kept good. *Kortright v. Cady*, 21 N. Y. 373 (78 Am. Dec. 145), though not the first, may be regarded as the leading

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case holding this view. A qualified and more conservative rule is adopted in those States where a mortgage is considered as immediately transferring the legal title to the mortgagee, subject to be defeated by the payment of the debt at the time and in the manner specified in the mortgage. In a few, the courts hold that an unaccepted tender after default will not, at law, re-invest the mortgagor with the title, and that his only remedy is in equity to redeem; but, in the others, the common-law rule, that after condition broken the title vests absolutely in the mortgagee, has not been applied so strictly, where the mortgage is of personal property, as to hold that a tender, after default, when kept good, can not, under any circumstances, operate the destruction of the lien.

There are *dicta* in some of our early cases, and probably the weight of authority is, that a tender after default, in order to effect the extinguishment of the title of the mortgagee, must be made before he has rightfully and peaceably taken possession for the purposes of foreclosure. This question, however, has never been decided in this State, though directly presented in *Frank v. Pickens*, 69 Ala. 369; the disposition of that case not calling for its decision. It is not presented in this case, the replications averring that the tender was made before the mortgagees acquired possession. We shall, therefore, leave it, as it has heretofore been, undecided.

It may be conceded that, by the strict rule of the common law, a tender after failure to perform the condition of the mortgage will not, at law, destroy the title, which has become absolute in the mortgagee by the forfeiture. In equity, however, a mortgage being regarded as incident to, and security for the debt, the rigor and harshness of the common-law rule has been greatly relieved by holding that the mortgagor has the right to redeem, if not barred by unreasonable delay, by payment, or tendering full payment at any time before foreclosure. But courts of equity will not enforce the equity of redemption so as to deprive the mortgagee of his security by discharging the lien of the mortgage; its enforcement is dependent upon payment of the debt by the mortgagor, or by a sale of the property. In many of the States, courts of law, while not taking cognizance of the equity of redemption for the purpose of enforcing the right to redeem, but acting upon and applying equitable principles, have extended to a tender after default the effect of a tender made at the time and in the manner specified in the mortgage, modified so as to prevent the mortgagee's depri-

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vation of his security without satisfaction of the debt. In *Frank v. Pickens*, *supra*, it was expressly held, that a tender of payment of the mortgage debt can not operate to extinguish the title of the mortgagee, unless the money tendered is kept ready to be paid to the mortgagee whenever he may manifest a willingness to receive it; and if the benefit of the tender is claimed in court, the money must be placed in the custody of the court, so that, if the tender be adjudged good, it may be awarded to the mortgagee—otherwise the mortgagor is regarded as having abandoned the tender. Recognizing the mortgagor's right of redemption, and observing the principles upon which courts of equity enforce it, the current of the later decisions is, that an unconditional tender after default, of the full amount due on the mortgage, if kept good, and the money brought into court, discharges the lien of the mortgage. We cite a few of the cases: *Craun v. McGoon*, 86 Ill. 43; 29 Amer. Rep. 37; *Know v. Williams*, 24 Neb. 636; 8 Amer. St. Rep. 220; *Matthews v. Lindsay*, 20 Fla. 962; *Musgat v. Pompelley*, 46 Wis. 660; Jones, Chat. Mortg. § 635.

The effect of a plea of tender, accompanied by bringing the money into court, came incidentally before this court in the case of *Foster v. Napier*, 74 Ala. 393. In that case, the suit was founded on a bond executed by Foster in the institution of a statutory action for the recovery of mules and a wagon. The record of the proceedings, pleadings and judgment in the action of detinue brought by Foster against Napier was read in evidence. In the action of detinue, Foster claimed the property under two mortgages, executed by Napier. A special plea was filed by Napier, averring payment of the mortgages, except one hundred and seventy-five dollars, which, the plea alleged, had been tendered to the mortgagee before action brought; and the money was brought into court. It is said: "The issues being thus formed, if the defendant proved the truth of his second plea, he was entitled to a verdict; but the money tendered would become the property of the plaintiff. In such case, the issue is confined to the debt, or its payment, for which the mortgage was given as security. . . . The defense set up in that suit, and the verdict and judgment thereon, taking into the account the pleadings and charge of the court on the trial, settled conclusively that Napier did not, at the commencement of that suit, owe Foster exceeding one hundred and seventy-five dollars on the debts secured by the mortgages, and that before suit was brought he had tendered that sum, and had it in court for Foster." The Vol. 95.

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principle of the decision is, that a tender before suit brought by the mortgagee to recover possession, when the money is brought into court, and the truth of the plea of tender is established, is tantamount to, and has the same effect as actual payment, in extinguishment of the lien and title of the mortgagee—in fact, it was treated as a payment.

Section 1870 of the Code declares: "The payment of a mortgage debt, whether the mortgage is of real or personal property, divests the title passing by the mortgage." Under section 2685, a plea of tender of money must be accompanied by a delivery of the money to the clerk of the court. If the money is deposited in court, and the truth of the plea established, the effect is to stop the running of interest from the time of tender. The money became the property of plaintiff, by relation, at the time when the tender was made. That such is the intention and effect of the statute, is manifest from the further provision, that if the tender be of personal property, the plea must aver readiness to deliver it to the plaintiff, and judgment for the defendant upon the plea vests the title to the thing tendered in the plaintiff, subject to any claim the defendant may have for his trouble in keeping it. A tender so made, and kept good, and the money brought into court, so as to be the equivalent of payment, if the tender be adjudged sufficient, comes within the spirit, equity and policy of section 1870 of the Code. On the foregoing principles, and in line with the current of the decisions of those States where mortgages are governed by the principles of the common law, we adopt as a safe and wholesome rule—conserving the ends of justice, protecting the mortgagor against oppression or undue advantage, and preventing injustice to the mortgagee—that a tender of full payment of the mortgage debt after default, and before the mortgagee has taken or demanded possession for the purpose of foreclosure, if kept good, and the money brought into court, operates to discharge the lien of the mortgage and extinguish the title of the mortgagee.

True, only the first replication avers that the money is brought into court; but the omission of this averment in the others is not assigned as a ground of demurrer. While we have left undecided, whether a tender after the mortgagee has taken or demanded possession will be effectual to discharge the lien of the mortgage, we hold that possession acquired after the tender is made, does not affect its operation. The replications not being obnoxious to any of the objections assigned as grounds of demurrer, the demurrers were properly sustained.

Affirmed.

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(Response to application for re-hearing.)

PER CURIAM.—The court is of the opinion that the replications of the plaintiff to defendant's special pleas are not free from fault. But the demurrers to the replications were properly overruled, because, as framed, they were not directed against the objectionable portions of the replications. We, therefore, adhere to the conclusion reached in the opinion, and overrule the application for re-hearing.

McDonald v. Walker.

Bill in Equity by Purchaser's Heirs, for Specific Performance of Contract for Sale of Lands.

1. *Correspondence of pleadings and proof; variance.*—The rule of equity pleading which requires that the pleadings and the proof shall correspond is applied with the greatest strictness to bills for the specific performance of contracts, extending even to redundant and superfluous averments with respect to a material fact, or descriptive of a matter or thing necessary to be alleged; as in this case, where the bill was filed by the heirs of a deceased purchaser of land to enforce a specific execution of the contract, alleging that he received the joint title-bond of the two vendors, while the evidence showed that the bond was executed by one of them only, and the variance was held fatal to relief.

APPEAL from the City Court of Birmingham, in equity.
Heard before the Hon. H. A. SHARPE.

The bill in this case was filed on the 28th October, 1885, by Wm. J. McDonald, as trustee, legatee and devisee under the will of his deceased wife, Mrs. Cynthia A. McDonald, joining the other legatees and devisees as complainants with him, against the administrator and heirs at law of Alburto Martin, deceased; and sought the specific execution of a contract for the purchase by Mrs. McDonald of several town lots in Birmingham from said Martin and one M. A. May, who were alleged to be tenants in common of the land at the time. The contract was made on the 12th June, 1873, the agreed price being \$400, for which sum Mrs. McDonald executed her two promissory notes, for \$200 each, payable on the 1st September and the 1st December, 1873, respectively; and the bill alleged that, "at the time of the execution of said notes, said Martin and May executed to Mrs. McDonald their joint and several bond, in the penalty

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of \$800, payable to her, her heirs and assigns, with condition that, if said Martin and May should make to her a good and sufficient title to said real estate when the purchase-money for the same should be paid, then said bond was to be void," &c. It was alleged, also, that the lots were at that time uninclosed, and without any building or other improvements; but there was no averment that possession was delivered or taken by the purchaser. The bill further alleged that, after the making of said contract, said May sold and transferred to Martin all of his interest in the land and in the notes given for the purchase-money; that afterwards, on the 20th March, 1875, Martin commenced an action at law against Mrs. McDonald on the notes, and recovered judgment against her on the 15th May, 1875, for the full amount of both notes; that after the death of Martin, the date of which was not stated, improvements were erected on the land by his administrator and heirs, or by other persons who paid them ground rent, the value of the land having increased; that the rents received by the defendants were equal to the amount due for the unpaid purchase-money; that one of the complainants, in April, 1884, in ignorance of the fact that the judgment was in fact paid by the rents received, tendered the amount due on the judgment to Martin's administrator, who refused to receive it, on the ground that the contract for the sale of the land had been rescinded by the parties while in life; and that said administrator then entered on the record, but without authority, satisfaction of the judgment on the ground of the alleged rescission. On these allegations, the bill prayed the specific execution of the contract of sale, and a divestiture of the legal title to the land out of the defendants; and offered to pay any balance of purchase-money that might be found due, after deducting the rents received by the defendants.

Wm. A. Walker, as Martin's administrator, was made a defendant to the bill, and being also appointed guardian *ad litem* for the minor heirs, he filed a formal answer for them, denying the allegations of the bill, and requiring strict proof thereof. A joint answer was filed by the administrator and the adult heirs, in which they thus answered the paragraph of the bill which alleged the contract of sale, the execution of a bond for title by Martin and May jointly, &c.: "These defendants admit, also, the facts stated in the second paragraph of the bill to be true, except the statement that a bond for title to said lots was executed by said Martin and May to Cynthia A. McDonald. Said defendants have no

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knowledge of the execution of such bond [if any?] was made." They further denied that Mrs. McDonald, at any time up to the death of said Martin, was ever entitled to a conveyance of the legal title to the land on payment of the purchase-money, and alleged that the contract for the sale of the land was rescinded by the parties while living. An amended answer was afterwards filed, pleading the statute of frauds.

On final hearing, on pleadings and proof, the City Court dismissed the bill, on the ground that there was "no sufficient proof of the title-bond or its contents, nor of any payment or writing in compliance with the statute of frauds." The complainants appeal, and assign the decree as error.

WATTS & SON, for appellant.

HEWITT, WALKER & PORTER, *contra*, cited *Goodwin v. Lyon*, 4 Porter, 297; *Ellis v. Burden*, 1 Ala. 458; *Aday v. Echols*, 18 Ala. 353; *Ellerbe v. Ellerbe*, 42 Ala. 643.

McCLELLAN, J.—The general principle, that the allegations of a bill in equity and the evidence adduced at the hearing must correspond, is applied with the greatest strictness to bills for the specific performance of contracts, to the extent indeed of requiring absolute correspondence, not only between every essential averment and the proof, but also between every redundant and superfluous averment with respect to a material fact, or descriptive of a matter or thing necessary to be alleged.—Daniell's Ch. Pl. & Pr., 860; *Goodwin v. Lyon*, 4 Port. 297; *Ellis v. Burden*, 1 Ala. 458; *Ellerbe v. Ellerbe*, 42 Ala. 643; *Winston v. Mitchell*, 87 Ala. 395; *Webb v. Crawford*, 77 Ala. 440.

Thus, where the bill alleged that the payments under a contract sought to be enforced were to be made in five equal annual installments, and the proof was that they were to be made in four or five such installments, it was held that the variance was fatal, and that a decree for specific performance of the contract was properly refused.—*Aday v. Echols*, 18 Ala. 353. And where the bill averred that the contract was made on Sept. 30, 1885, while the proof showed that it was made September 30, 1886, the variance was held to be fatal to relief; and this notwithstanding the abstract rights of the parties were the same, whether the contract bore the one or other of these dates. The court said: "There is no class of cases in which correspondence between the allegations of the bill and the proof is more rigidly exacted than in suits for the

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specific performance of contracts. The allegation of the time when the contract is made is descriptive of that which is material, and the variance between the allegation and proof is fatal."—*Johnson v. Jones*, 85 Ala. 286; also, *Hamaker v. Hamaker*, 85 Ala. 231.

The same doctrine is somewhat more fully stated by BRICKELL, C. J. as follows: "The rule prevailing in courts of equity is, that pleading and proof must correspond. It is not only necessary that the substance of the case made by each party should be proved, but it must be substantially the same case as that which he has stated upon the record; for the court will not allow a party to be taken by surprise by the other side proving a case different from that set up in the pleading.—*Floyd v. Ritter*, 56 Ala. 356; *Alexander v. Taylor*, *Ib.* 60. The averment of the bill is, in general terms, that the debt secured by the deed of trust has been fully paid. This is followed by an averment more precise, stating the time, mode and source of payment, and describing the particular transaction from which it was derived. The latter averment may have been unnecessary and redundant. A general statement or averment of the payment of the debt would have been sufficient, without descending to a statement of the particular facts or circumstances proving or conducing to prove it. If redundant allegations are introduced into pleading, and they are descriptive of that which is material, a variance between the allegations and proof is fatal—of the same consequence as the variance between the allegation of an essential fact, of that which is material, and the evidence or proof of the fact.—1 Greenl. Ev. §67. The same measure of relief may be obtainable upon the facts proved, as could have been obtained if the particular facts averred had been proved; but the court can not permit the opposite party to be misled and taken by surprise by the proof of a case differing from that set up in the pleadings, and which, it is presumed, he came prepared to meet, as it is the case he had notice to resist."—*Floyd v. Ritter*, *supra*; *Meadows v. Askew*, 56 Ala. 584; *Bellows v. Stone*, 14 N. H. 175; *Gilmer v. Wallace*, 75 Ala. 220.

The application of the doctrine of the foregoing authorities to the case at bar, leads us to the same result attained by the City Court. The contract sought to be enforced is evidenced by a bond for title upon payment of purchase-money. The bill alleges that this bond was executed jointly and severally by Alburto Martin and Marion A. May. If the evidence establishes the execution of any bond, it is not that of Martin and May but that of Martin alone. Even if

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it be conceded that, had the averment been that the bond was executed by Martin alone, the complainants—other considerations being pretermitted—would be entitled to the relief prayed on the evidence we find in this record ; even conceding that, although the sale was made by Martin and May, and the land at the time belonged to them as tenants in common, the complainants, in view of Martin's subsequent acquisition of May's interest, would be entitled to the relief prayed on averment and proof of a bond executed by Martin alone ; conceding for the argument, in short, that the averment that May also executed the bond was not material to complainants' case, but redundant and superfluous ; yet it is descriptive of the bond, and the bond is absolutely and essentially material. And this material thing thus laid and described became material as laid and described, and had to be proved with all the particularity, so far as May's relations to it are concerned, that confessedly would have been necessary had complainants' rights in point of fact depended upon the execution of the bond by May. This variance between the averments of the bill and the proof adduced at the hearing is fatal to the relief prayed ; and the decree denying that relief and dismissing the bill is affirmed.

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Appeals from Discharge on Habeas Corpus.

1. *State's proprietary rights in and to oyster-beds and oysters.*—The State of Alabama owns the absolute property in the oyster-beds and oysters in her navigable waters, holding it in trust for the use and benefit of her people, subject only to the paramount right of navigation ; and in the exercise of her property rights, she may, by legislative enactment, grant or give away the right to take oysters, restricting the grant to her own citizens, and qualifying the exercise of it by them by limitations as to time and manner of taking, selling, or transporting, until the oysters have become an article of inter-state commerce, and as such subject to the laws of the United States.

2. *Same ; when oysters become articles of inter-state commerce.*—Oysters taken from the beds within the limits of Alabama, by the persons to whom the qualified right is granted by legislative enactment, do not become articles of inter-state commerce until they have been shelled, and their transportation into another State has been begun.

3. *Constitutionality of law "regulating the planting and taking of oysters in the waters of this State."*—The statute approved February Vol. 95.

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18th, 1891, entitled "An act to regulate the planting and taking of oysters in the waters of this State" (Sess. Acts 1890-91, pp. 1072-84), is not an unlawful attempt to regulate inter-state commerce; nor is it violative of the constitutional provision which requires that each law shall "contain but one subject, which shall be clearly expressed in its title," each of the provisions contained in it being cognate and referable to the subject expressed in the title.

FROM the City Court of Mobile.
Tried before the Hon. O. J. SEMMES.

The opinion states all the facts of the case.

WM. L. MARTIN, Attorney-General, for the State, with whom was GAYLORD B. CLARK, filed a printed brief and argument, from which the following extracts are taken:—The title of the State to the oyster-beds within its jurisdiction has not its source in private concession, nor in legislative declaration. It dates from the birth of the State, and rests upon its sovereignty. Prior to the Revolution, the dominion and property in navigable waters, and the lands under them, were held to belong to the European nation by which the particular portion of the county was first discovered. When the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all navigable waters, and soils under them, for their own common use; and these rights the States still possess, subject only to the paramount right of navigation, the regulation of which, with respect to foreign and inter-state commerce, has been granted to the United States. There has been no such grant of power over the fisheries. These remain under exclusive control of the State, which may pass such laws as may be deemed expedient to secure to its own citizens the enjoyment of their common property.—*New Orleans v. United States*, 35 U. S., 10 Pet. 662; *Martin v. Waddell*, 41 U. S. 16 Pet. 367; *Pollard v. Hogan*, 44 U. S., 3 How. 212; *Den v. Jersey Company*, 56 U. S., 15 How. 426; *Smith v. Maryland*, 59 U. S., 18 How. 71; *McCready v. Virginia* 94 U. S. 391; *Manchester v. Massachusetts*, 139 U. S. 240; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Smith v. Levinus*, 8 N. Y. 472; *Dunham v. Lamphere*, 3 Gray, (Mass.) 268; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57; *Commonwealth v. Bailey*, 13 Allen, (Mass.) 541; *Haney v. Compton*, 36 N. J. L. 507; *Hess v. Muir*, 65 Md. 586, 3 Cent. Rep. 891; *Huntington v. Lowndes*, 40 Fed. Rep. 625; Gould on Waters, 2 ed.,

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§§ 32, 36, 38, 189; *Tinicum Fishing Co. v. Carter*, 31 Pa. St. 21, 100 Am. Dec. 597.

The foregoing authorities establish beyond all question the truth of the following propositions, subject only to the paramount right of navigation in the United States: (1.) The State owns the beds of all tide-waters within its jurisdiction. (2.) The State owns the tide-waters themselves, and the oysters in them. (3.) This ownership is that of the people of the State as tenants in common. (4.) Non-residents of the State have no right to, or interest in this property. In short, the people of Alabama are the sole and absolute owners of the oysters in question, with a right of dominion and control as full, complete and perfect as that which Blackstone ascribes to every freeman with respect to his own property. Acting through their legislature, they may appropriate this property to their own exclusive use and enjoyment, or share it with their neighbors, just as the individual citizen may do with that which is his own; they may deny its use to themselves and to all others, for a period of time or for all time; direct whether and to what extent it shall be marketed, select the market and the means of transportation thereto; determine the time, manner and extent when and whereby their title shall be divested, as fully and effectually as could be done by individual volition and contract as to private property. Whatever and however the individual may do with his own property, the community may likewise do with their own. The individual may prescribe the terms and conditions on which he will part with the title to his property, if at all; he may at his option dispose of the entire interest or a qualified title, prefer an inland or a foreign market, hold his property within State limits or place it in the channel of inter-state trade, as he may see fit; and so long as he retains the title, it is under his lawful control. The holder of a qualified interest is bound by the qualifications and restrictions which accompany it. The stream can not rise above its source. A party taking oysters from the beds of the State, takes them with all the qualifications and restrictions imposed by law.

The State may forbid all such acts as would render the public right less valuable.—*Smith v. Maryland*, *supra*. The unrestricted shipping from the State of oysters in the shell would defeat the utilization of the shells in the propagation of oysters, and thereby render the public right less valuable.—Sec. 5, Vol. 2, U. S. Com. of Fish & Fisheries, p. 564.

If, in any view, the prohibition against shipping oysters in the shell out of the State can be held to affect inter-state
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commerce, it will not be considered as an exercise of that power, but as flowing from the acknowledged power of the State to regulate and control the subject.—See *County of Mobile v. Kimball*, 102 U. S. 691; *Kidd v. Pearson*, 128 U. S. 1; *Escambia Co. v. Chicago*, 107 U. S. 678; *Transportation Co. v. Parkersburg*, 107 U. S. 691; *Morgan Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455; *Smith v. Alabama*, 124 U. S. 465; *Nashville & Chattanooga R. R. v. Alabama*, 128 U. S. 96; *Kimmish v. Ball*, 129 U. S. 217.

The fact that the oyster when caught, culled, inspected, and the tax paid, becomes an article of commerce within the State of Alabama, does not constitute it an article of inter-state commerce; and until it becomes such, it remains a part of the general mass of property of the State, and subject to the control exclusively of the legislative power of the State.—*Coe v. Errol*, 116 U. S. 517.

The act is not obnoxious to that clause of the Constitution which declares that "each law shall contain but one subject, which shall be clearly expressed in its title."—*Ballentyne v. Wickersham*, 75 Ala. 533.

GREG. L. & H. T. SMITH, with whom was M. D. WICKERSHAM, for the defendants.—(1.) The principal question presented is, whether the State of Alabama, while making oysters in the shell an article of commerce in the State, can restrict and forbid their use as an article of inter-state commerce. It is conceded that the oyster-beds in the Bay, and oysters while in the bed, are the property of the State, held by it in trust for the citizens of the State; and that the State can grant the right to take oysters from the beds upon such terms and conditions as it may choose to prescribe, provided such terms and conditions do not violate or conflict with a paramount law. It is well settled, also, that the State may regulate the seasons and the manner of catching oysters, restrict the right to take them from the beds to the citizens of Alabama, and make other similar regulations. The cases cited for the State sustain these propositions, but they go no further. Can the State place burdens or restrictions upon inter-state commerce, in a commodity which is an article of commerce within its boundaries? It certainly can not, without permission from Congress, restrict, burden, or prevent the importation from other States, into its boundaries, of any articles of commerce, nor place limitations or burdens on their importations.—*Leisy v. Hardin*, 135 U. S. 109; *Tiernan v. Rinker*, 102 U. S. 125; *Telegraph Co. v. Texas*, 105 U. S. 460;

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McCall v. California, 136 U. S. 105; *Brimmer v. Rebman*, 138 U. S. 78. Is there any difference, in principle, between the importation and the exportation of an article of commerce? If interference with importations, by prohibitions, restrictions, or burdens, be a regulation of commerce forbidden to the State, is not the prohibition, restriction, or imposition of burdens on the exportation of similar articles, equally within the constitutional inhibition? The exclusive regulation of commerce was vested in the United States for the purpose of preventing the several States from discriminating, in favor of their own citizens and products, against the citizens and products of other States.—*Mobile v. Kimball*, 102 U. S. 697. This discrimination may be accomplished by prohibiting exports to other States, as well as by prohibiting imports from them. Commerce consists in “transportation, purchase, sale and exchange of commodities.”—*Leisy v. Hardin*, 135 U. S. 109; *McCall v. California*, 136 U. S. 109. The Alabama statute makes the oyster, not only an article of State commerce, but also of inter-state commerce.—*Lord’s Case*, 102 U. S. 541. “Whenever an article has begun as to move a commodity of trade from one State to another, commerce in that article has commenced.”—*Daniel Ball*, 10 Wall 565; *Kidd v. Pearson*, 128 U. S. 1. The direct question here involved has been considered and decided in *Territory v. Evans*, 23 Pac. Rep. 115; *McBride v. Reitz*, 19 Kans. ; 22 N. Ed. 778.

(2.) The statute is unconstitutional, because it relates to at least four different subjects, only two of which are expressed in the title.

COLEMAN, J.—The defendants were arrested for a violation of the act of February 18th, 1891, pp. 1072-1084, entitled, “An act to regulate the planting and taking of oysters in the waters of this State.” Upon *habeas corpus* proceedings the defendants were discharged, the court holding that the act of the legislature was unconstitutional and void, as contravening the third sub-division of the eighth section of Article I of the Constitution of the United States, which provides, that Congress shall have power “to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.”

Sections 1 and 2 of the act of the legislature under consideration read as follows: SECTION 1. “That the title to and property in all oysters in the waters of this State, whether upon public reefs or in so called private beds, or whether the same be transplanted by riparian proprietors

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under authority of law or otherwise, or whether the same be a growth from natural deposit, is, and shall remain in the State, until such title shall be divested in manner and form as herein authorized or provided." SECTION 2. "That a license is hereby given to resident citizens of the State of Alabama to catch and take oysters, the property of the State, from the public reefs, or from private beds planted and owned by them, or in which they have secured an interest, or permission from the proprietor thereof to take such oysters, upon the terms and conditions, and subject to the restrictions and regulations hereinafter set forth and enacted ; but no person or persons not a resident of the State of Alabama is or shall be authorized to take or transport any such oysters from, in or through any of the waters of the State of Alabama ; and it is unlawful for any person, whether a citizen of the State of Alabama or of any other State or country, to ship beyond the limits of this State any oysters taken from the waters of this State while the same are in the shells ; *Provided*, that between the middle of December and the middle of January, oysters in the shells may be shipped in barrels by railroad to other States ; *and provided further*, that such oysters in the shell may be shipped *bona fide* from any point in the State of Alabama to any other point in said State, by the lines of transportation which lie partly within and partly without the State of Alabama ; *and provided further*, that any resident citizen of the State of Alabama who shall lawfully take any oysters from the tide-waters of this State, as in this act authorized, shall have a qualified interest or property in the oysters so lawfully taken while in the shell, which he may sell and transfer to any other person within the limits of the State of Alabama ; and after said oysters have been shelled within the State of Alabama, such lawful taker or his assigns, as the case may be, shall be vested with all of the State's property and title in and to said oysters, and shall have the right to sell such oysters and shells, or ship the same beyond the limits of this State, without restriction or reservation ; *Provided further*, that in case of any infringement of the foregoing qualified interest in said taker of oysters, said taker may, in his own name, maintain an action against the wrong-doer, either in case or trover as may be proper ; and in case of larceny, or other public offense concerning such oysters, while in the hands of a lawful taker, the ownership thereof shall be averred in such taker or possessor, when by law it shall be necessary to aver ownership."

We deem it unnecessary to set out the whole act.

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The principles of law applicable to the facts of the cases before us do not call for a discussion or adjudication of that clause of section 2 which relates to the shipment of oysters in the barrel by railroad, from the middle of December to the middle of January, or that clause which permits transportation by lines which lie partly without the State. *Jones v. Black*, 48 Ala. 540. The agreed facts are, that the oysters were taken and shipped in the shell beyond the limits of the State, by the defendants, in the month of September, in sailing vessels ; that Harrub was a citizen of Alabama, and Melvin a citizen of the State of Mississippi ; and that both were guilty of a violation of the statute. The question involved is as to the constitutionality of the act.

The first question we will consider is as to the extent of the ownership and control of the State of Alabama in and over the oyster-beds and oysters within her territorial limits.

In the case of *Martin v. Lessee of Waddell*, 16 Peters, 411, Chief-Justice Taney declares, as a general principle, "When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the General Government."

In the case of *Smith v. Maryland*, 18 How. (U. S.) 71, the question was as to the constitutionality of an act of the State of Maryland, which was entitled an "Act to prevent the destruction of oysters in the waters of this State." The court laid down this principle: "But this soil is held by the State not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish. The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment, so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held."

In the case of *McCready v. Virginia*, 94 U. S. 391, the foregoing principles were re-affirmed, and the court went further and declared: "The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been

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granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which consequently has the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than regulation of the use by the people of their common property. . . . It is in fact a property right, and not a mere privilege or immunity of citizenship. . . . It does not belong of right to the citizens of all free governments, but only to the citizens of Virginia. They, and they alone, owned the property to be used, and they alone had the power to dispose of it as they saw fit. . . . The State may by appropriate legislation confine the use of the whole to its own people alone."

In the case of *Haney v. Compton*, 36 N. J. Law, 522, it was said: "But it can not with any propriety be said, that a statute which simply prohibits non-residents on board a vessel from subverting the soil of the State, and carrying away her property, or that of her grantees, leaving such vessel to pass and repass, and go whithersoever those in charge of her may desire, is a regulation of commerce with foreign nations or among the States. It is a law for the protection of property—at most, an internal police regulation, entirely within the competency of the State to adopt; and it is not perceived that it can by possibility interfere with commerce in the sense in which that word is used in the Federal Constitution."

In *Manchester v. Massachusetts*, 139 U. S. 259, the court reaffirmed the principle declared in the case of *McCready v. Virginia*, *supra*; and the same principle is announced in *Dunham v. Lamphere*, 3 Gray, 268.

We think it clearly established, that the people of Alabama own absolutely the oyster-beds and oysters in question, and that it is a property right, as complete and perfect as that held to any other property. As was said by Chief-Justice Waite in *McCready v. Virginia*, 94 U. S., *supra*, "the principle is not different from the planting of corn upon dry land." We think it further settled, that the people of Alabama, through its legislature, alone have the power to dispose of their property rights in their oyster-beds and oysters; and if they see proper, may dispose of them to their own people only. It is further settled, that the legislature has ample authority to adopt all precautions and regulations deemed desirable or

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necessary for the preservation and increased production of its fisheries.

That the power of Congress to regulate commerce with foreign nations, among the several States, and with the Indian tribes, is unlimited and exclusive of the power of the State, is settled law. Any statute of a State not authorized by Congress, which in any way obstructs or interrupts free navigation, or restricts or burdens any commodity which is an article of inter-state commerce, must be declared null and void.—*Tiernan v. Rinker*, 102 U. S. 125; *Tel. v. Texas*, 105 U. S. 460; *Brimmer v. Rebman*, 138 U. S. 78; *Leisy v. Hardin*, 135 U. S. 109.

To constitute commerce, there must be traffic and intercourse, and to constitute inter-state commerce, there must be traffic and inter-state intercourse—an “intermingling” between different States. As Mr. Chief-Justice Marshall says in the case of *Gibbons v. Ogden*, 9 Wheaton, 1, “Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one. . . . The completely internal commerce of a State may be considered as reserved to the State itself.” We understand this great case to distinctly recognize the absolute power and control of the State upon subjects within its territorial jurisdiction which are not articles of foreign or inter-state commerce.

The case of *Coe v. Errol*, 116 U. S. 517, decides an important principle as to the right of the State to tax *its products*, although the owner may intend them for exportation, and although they may be in process of preparation for exportation at the time of the assessment of the tax; but the case is important in the present connection in determining that “there must be a time when they [the products] ceased to be governed exclusively by the domestic law, and began to be governed and protected by the national law of commercial legislation;” quoting from the case of *The Daniel Ball*, 10 Wall. 565, as follows: “Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.” But that movement, says the court, “does not begin until the article has been shipped or started for transportation from one State to another.” Carrying it from the farm or forest to the depot is only an interior movement of the property, and although it may be for the purpose of exportation, this is no part of the exportation itself.

If the statute of Alabama under consideration militates Vol. 95.

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against any of these well established principles, in regard to inter-state commerce, it must yield to the dominant supremacy of the Federal Constitution. We do not understand the power vested in Congress to regulate inter-state commerce gives it power over domestic commerce, or authorizes it to regulate the commerce between the citizens of the same State, or different parts of the same State. This power belongs to the several States, and is exclusive of the power of Congress. If the State of Alabama should attempt by legislation to tax or burden or restrict the shipment of oysters from the State of Mississippi or other States, such legislation would be unconstitutional; or, if the State of Alabama should attempt to impose similar or other conditions upon the shipment of any articles of inter-state commerce from this State to another State, that would be an interference with the law of inter-state commerce, which power alone is vested in Congress. To constitute inter-state commerce, however, as we have said, there must be an article or commodity the subject of commerce and destined to pass from one State to another.

These authorities do not militate against, but recognize the power of the State to confine the use of the oyster to its own citizens, and to regulate its shipment and disposition within its borders for their use. This would be domestic commerce, as distinguished from inter-state commerce. Neither do we understand the power of Congress to regulate inter-state commerce in any way interferes with or restricts the right of the State to prohibit its own property, to which it has an exclusive title, from becoming an article or commodity of inter-state commerce.

In the same line may be cited the case of *Amer. Expr. Co. v. People*, 24 N. E. Rep. 758. The statute of Illinois for the protection of game permitted the killing of game-birds for two months in the year. The statute forbade the sale of the game-birds at any time, and made it unlawful, under a penalty, for any carrier or corporation knowingly to receive and transport or convey them beyond the State for sale. Under the act, at the proper time, a person was permitted to kill game for his own use, but not to go upon the market as an article of commerce. The constitutionality of the act was upheld, the court declaring, "the ownership was in the people of the State. This being so, it necessarily follows that the legislature had the right to permit persons to kill or take game upon such terms and conditions as its wisdom might dictate, and that the person killing game might have such property interest in it, and such only, as

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the legislature might confer. The legislature never conferred an absolute property in quail upon the person who might kill the same." It was held that the discretion of the legislature in making rules and regulations for the preservation and protection of the game-birds was not subject to judicial control.

The property rights of the oysters being in the State exclusively, and the legislature having full authority to prohibit it from becoming an article of inter-state commerce, and to reserve the oysters for the sole use of its own citizens, and to regulate the sale between its own citizens and between different parts of the State; the question arises, when does the oyster, under the statute, become an article of inter-state commerce, and what provision of the statute attempts to burden, restrict or control it after it has this character. The first section explicitly declares, that "the title and property in all oysters in the waters of this State . . . shall be divested in manner and form as herein authorized and provided." That this is a valid enactment, under the principles of law declared in many of the foregoing decisions, can not be questioned. The second section gives a license to resident citizens to catch and take oysters the property of the State, and further enacts that "no person or persons, not a resident of the State of Alabama, is or shall be authorized to take or transport any such oysters from, in or through any of the waters of the State of Alabama; and it is unlawful for any person, whether a citizen of the State of Alabama, or of any other State or country, to ship beyond the limits of this State any oysters taken from the waters of his State while the same are in the shells; *provided that*, between the middle of December and the middle of January, oysters in the shell may be shipped in barrels by railroad to other States," &c. That the State has the right to license its own citizens to catch and take oysters, and to deny to citizens of another State the right to take and transport them, and absolutely to prohibit the shipment of oysters beyond the limits of the State, and to regulate the sale of them within its own limits, not imposing any conditions or burdens or restrictions upon the oyster as a commodity after it has entered another State, or after it may be legally delivered in this State for exportation to a common carrier, or ways by which inter-state commerce is effected, we think is clearly established by the following authorities: 36 N. J. Law, *supra*; *The Daniel Ball*, 10 Wall. 557; *Coe v. Errol*, 116 U. S. 517; *Gibbons v. Ogden*, 9 Wheat. 1; *McCready v. Virginia*, 94 U. S. Vol. 85,

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supra; *Kidd v. Pearson*, 128 U. S. 1; 24 Fed. Rep. *supra*; *Phil. & R. R. v. Pa.*, 15 Wall. 250-2.

If the State has the power to prohibit the exportation of its oysters absolutely, *a fortiori*, it may limit the shipment of such oysters to such as may have been shelled. If the legislature sees proper, as a means to prevent the exhaustion of its oyster-beds, to grant to the takers, who can only be resident citizens of the State, or their grantees within the State, such a qualified property right in the oyster as will permit its exportation only after it is shelled, where is the authority to judicially control this discretion, or what principle of the inter-state commerce law is violated by such an enactment? The oyster is the absolute property of the State. The State certainly has the power to prevent its becoming an article of inter-state commerce. Until it becomes an article of inter-state commerce, Congress has no authority or control in the premises. The State, by the statute itself, expressly retains the title to the oysters, and prohibits their shipment beyond the State until shelled. Only after it is shelled does the State relinquish its title, and the grantee previously having but a qualified interest, becomes the absolute owner, and the oyster may then become an article of inter-state commerce. When shelled, and the State has parted with its property rights, the State no longer interferes with the article. The owner ships it wherever he pleases, and by whatsoever transportation he prefers.

The statute nowhere interferes with or obstructs the sailing of the vessels. They can come and go when and whithersoever those in control see proper; but this did not authorize them to subvert the soil of Alabama, and to transport in September oysters in the shells from the reefs of Alabama to other States. The statute expressly prohibited it.

The vice in the argument of the defendant's counsel is in assuming that the oyster in the shell was an article of commerce, when in fact the taker, who could only be a citizen of the State, as we have seen, had but a qualified interest in the oyster, and which he could dispose of only in the State. It would be unsound reasoning to hold that the State could prohibit absolutely the taking of its oysters, or confine the use of them exclusively to its own citizens, and yet could not prevent the taker from shipping them beyond the limits of the State. If the statute had undertaken to invest the taker, or his grantee, with a full and absolute property right and title to the oyster in the shell, so as to

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invest him with the power to convert it into an article of commerce, and had then undertaken to prevent its shipment, or burden its shipment with a tax, a different question might arise. That is not the case here. The State carefully guards against this condition, and it is only after being shelled can it be said that the oyster has become an article of inter-state commerce.

These conclusions are fully sustained by the reasonings and principles declared in the case of *Kidd v. Pearson*, 128 U. S., *supra*, in which Mr. Justice Lamar discusses at length and with great clearness the doctrine of inter-state commerce, and the application of the principles stated in *Gibbons v. Ogden*, 9 Wheaton, 1, and *Coe v. Errol*, 116 U. S. *supra*, and other cases cited above.

The policy of the legislature in making provision to keep the shells within the State might be based upon many considerations. However, this court is not called upon to adjudicate upon the policy of the legislature, and we will not consider this view further than to make the following citations from section 5, volume 2, U. S. Commission of Fish and Fisheries, 564: "Besides being useful for making roads, streets, filling wharves and lowlands, and making lime, the shells are of great utility as stools for new oyster-beds, as experiments beginning fifty years ago have demonstrated.

These and other minor utilizations are disappearing, however, along the northern coast, through the increased value of the shells to spread on the bottom for the foundation of new colonies, as has been explained; and before long, no doubt, nearly all the shells accumulated will be saved by planters for this purpose, as a better economy than to sell them."

When tested by the rule declared in *Ballentyne v. Wickersham*, 75 Ala. 533, the statute is not obnoxious to the objection that it contains subjects not clearly expressed in the title. The rule, as there held, is, that it is "sufficient if they [the subjects] are all referable and cognate to the subject expressed" in the title.

Our conclusion is, that the act is not unconstitutional, and that the court erred in its judgment.

Reversed and remanded.

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107 220*Action on Common Count, for Goods Sold and Delivered.*

1. *Sale of personal property; want of title, as defense to action for purchase-money.*—In an action to recover the price of personal property sold and delivered, the purchaser remaining in undisturbed possession, and no fraud being alleged, a want of title in the vendor is no defense, though accompanied with an offer to rescind and its refusal.

APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. JOHN B. TALLY.

This action was brought by Oehmig & Wiehl, suing as partners, against Henry Johnson and L. M. Gordon, and was commenced on the 13th December, 1888. The complaint contained a single count, which claimed \$200 "due by account for goods, wares and merchandise, sold by plaintiffs to defendants on or about 30th July, 1888." The defendants pleaded (1) "not indebted," and (2) that the account sued on was made for a stationary engine and set of mill rocks which defendants bought from plaintiffs at the agreed price of \$300, of which amount \$100 was paid in cash; that after said purchase, and after the payment of said \$100, defendants ascertained, and they here aver, that plaintiffs had no title to said engine, but the title to the same was in one A. B. Farquhar; that said engine was the principal inducement to said purchase, and before defendants ascertained plaintiffs' want of title to said engine they had made very valuable improvements on said engine; that they offered to rescind said contract after they ascertained that plaintiffs had no title to said engine, by returning to them all the property purchased of them, if they would pay back said \$100 and the value of the improvements put on said engine, but plaintiffs refused to do this; and defendants aver that they are now ready to rescind said contract, if plaintiffs will pay back said \$100 and the value of said improvements; and further, that plaintiffs represented to defendants, at the time of said purchase, that they had a good title to said engine." The court sustained a demurrer to this plea, and its judgment is here assigned as error.

DAVIS & HARALSON, for appellants, cited *Ogburn v. Ogburn*, 3 Porter, 126; *Harris v. Rowland*, 23 Ala. 644.

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L. A. DOBBS, *contra*, cited *Brown v. Freeman*, 79 Ala. 406; 2 Benjamin on Sales, §§ 948, 1347.

WALKER, J.—In *Ogburn v. Ogburn*, 3 Porter, 126, it was held that the vendee of personal property can not, while holding possession thereof, defend against an action for the purchase-money, by proof of want of title in the vendor. In the course of the opinion in that case it was said: "We think no defense can be made to an action for the purchase-money, when the facts relied upon to make it would not, if the parties were changed, and the money had been paid, enable the vendee to recover it back for the breach of the warranty of title." The defendants would not be entitled to such recovery on the facts stated in their second plea. In an action by a vendee of personal property against his vendor, for a breach of warranty of title, only damages for actual loss can be recovered. The plaintiff in such an action must not only establish that his vendor is without title to the property sold, and that another is the true owner, but also that he has restored the property to such owner; that it has been taken from him under compulsory proceedings, or that he has parted with money or property in consequence of a judgment obtained against him, or voluntarily in answer to a claim made for the property.—*O'Brien v. Jones*, 91 N. Y. 193. In *Harris v. Rowland*, 23 Ala. 644, the property sold had been recovered on the adverse title. No such state of facts is shown by the second plea in this case. It is not averred that the defendants have in any way been disturbed in their possession of the property. If that possession remains undisturbed, their title will be perfected by lapse of time. If a paramount title is asserted, the plaintiffs may settle with the adverse claimant, or they will be answerable in damages on their warranty of title, if the defendants shall be required to deliver up the property in response to a claim by one who may prove to be the true owner. So long as the vendee of personal property remains in undisturbed possession, he can not recover damages in an action on an implied warranty of title, or set up want of title in his vendor as a defense to an action for the purchase-money, unless there were fraudulent representations made by the vendor in regard to the title. Such a vendee in peaceable possession has nothing substantial to complain of in the fact that his vendor was not the true owner of the property. When nothing more is shown than that he may suffer loss in the future, in consequence of the outstanding claim to the property, he must rely upon his warranty, and he can not sue

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thereon until he has suffered damage because of its breach. *Case v. Hall*, 35 Am. Dec. 605, and note; *Sumner v. Gray*, 33 Am. Dec. 39; *Burt v. Dewey*, 100 *Ib.* 482, and note; 2 Benjamin on Sales (Corbin's Ed.), §§ 948 and 1347, and notes. There was no error in sustaining the demurrer to the second plea.

Affirmed.

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Bill in Equity for Partition of Lands.

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119	624
95	191
124	210

1. *Champerious contract*.—Champertry is a good defense to an action founded on the champertrous contract, and may be claimed by demurrer or answer, as the facts may or may not appear on the face of the bill or complaint; but a stranger to the contract can not set up the champertry in defense of an action by a third party to enforce rights acquired under it.

2. *Adverse possession, as between tenants in common*.—The possession of land by one tenant in common is not adverse to his co-tenant, unless an actual ouster is shown, or facts which the law deems equivalent to an ouster.

3. *Partition; claim of adverse possession; issue at law*.—In a suit for the partition of land between tenants in common, if the defendant claims adverse possession of the entire tract, this does not oust the jurisdiction of the court, but requires a suspension of the proceedings until the question of disputed ownership can be settled on an issue made up and submitted to a jury.

4. *Conveyance of lands adversely held*.—A conveyance of lands adversely held is void as against the adverse possessor and those claiming under him; but this principle does not apply to a purchaser at a judicial sale, even though he is the plaintiff in the judgment or process.

5. *Payment of mortgage debt; conclusiveness of decree of foreclosure*.—Payment of the mortgage debt is a complete defense to a suit for foreclosure; but, if the heirs and administrator are made parties to the foreclosure suit, and neither of them interposes that defense, the decree is conclusive evidence that the debt is unpaid, unless the heirs can successfully impeach it on the ground of fraud and collusion between the administrator and the mortgagee or his assignee, who also became the purchaser at the sale under the decree.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. WM. H. TAYLOR.

The bill in this case was filed on the 6th October, 1890, by Origen S. Sibley against Peter F. Alba, and sought partition of a certain tract of land of which the com-

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plainant claimed to own an undivided one-half interest, and alleged that the defendant was seized of the other half as tenant in common with him. The bill contained an allegation in these words: "Your orator shows that his title to the said undivided one half of said lands is derived as follows: James H. Duvall, being seized of an indefeasible estate in fee simple in and to said undivided one-half interest in and to said lands, on the 6th October, 1869, did convey the same to A. H. Brown, then doing business under the name of A. H. Brown & Co., by deed of mortgage to secure an indebtedness of \$2,500; which said mortgage, said mortgage indebtedness, and the undivided one half in and of said lands, were, on the 10th November, 1888, assigned and conveyed to your orators by the executors of the last will of said A. H. Brown, then deceased; whereupon your orator exhibited his bill in this court, in the cause entitled *Origen Sibley v. E. S. Barnes, administrator, et al.*, being No. 4762 on the docket of this court, praying for a foreclosure and sale of the said premises. In said cause such proceedings were had that the undivided one-half interest in said lands was sold by the register under the decree of the court to your orator, and the register has made and executed to him a deed of conveyance of said undivided half interest in said lands which had been of said James A. Duvall. *The record and proceedings in said cause No. 4762 on the docket of this court are here referred to, and made a part of this bill.*"

The defendant demurred to the bill, assigning as grounds of demurrer, (1) because it shows, by reference to the record of case No. 4752, that E. S. Barnes is in fact interested in the suit with said Sibley, and he is not named as a complainant; (2) because it shows that said mortgage was paid and satisfied before it was purchased by complainant; (3) because it seeks to assert rights acquired by complainant under a contract which is shown to be champertous; (4) because it shows that defendant was in adverse possession of the land, under claim of ownership, at the time of complainant's alleged purchase under the mortgage. On the filing of this demurrer, the complainant amended his bill by striking out the italicized words above set out; and the defendant then withdrew his demurrer, and filed four pleas in bar, in substance as follows:

Plea No. 1. The court ought not to take cognizance of said bill, "because the said suit is founded on and grows out of a certain contract tainted with champerty and maintenance, to which the said complainant was and is a party, Vol. 95.

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and which he is now attempting by this bill to execute and enforce. Said contract is as follows: In the year 1888, one Edward S. Barnes, who makes a business of searching the records of Mobile county, discovered thereon an ancient mortgage executed on the 6th of October, 1869, by one James Duvall to secure to A. H. Brown & Co., of Zanesville, Ohio, the payment of a debt of \$2,500, not evidenced by notes, but payable in installments, one half on the 6th of October, 1870, and one half on the 6th October, 1871. As soon as the said Barnes made this discovery, he at once began a search for the executors of A. H. Brown, who composed the firm of A. H. Brown & Co., who were found in Zanesville, Ohio, and in New York. In this wise the said executors were informed of the existence of such mortgage, of which they did not know, and which they had not counted as an asset of said Brown's estate. Finally, after some investigation, which disclosed the fact that in 1873 said mortgage had been put in the hands of the law firm of Anderson & Bond of Mobile for collection, and upon their docket the entry was made, '*Settled between the parties;*' the said executors agreed to sell and assign said mortgage, which, if unpaid, then amounted to nearly \$6,000, to said E. S. Barnes, for the nominal sum of one hundred and fifty dollars. After the terms of said sale were arranged between said executors and the said Barnes, the last named found himself unable to raise said sum. Thereupon the said Barnes went to his brother-in-law, Origen Sibley, the said complainant, and induced him to advance said sum of one hundred and fifty dollars, upon the following terms and conditions: it was agreed that the said Sibley should advance said sum, and take an assignment of said mortgage from said executors, and then file a bill in his own name for the foreclosure of the same; with the further agreement that the profit and fruit of said suit should be equally divided between said Sibley and Barnes. In accordance with said agreement, the said Sibley did on February 18th, 1889, file a bill to foreclose said mortgage in this court in cause No. 4762, and to that bill the said E. S. Barnes was made a party defendant, as the administrator of said Jas. H. Duvall, who had died before said bill was filed. In said suit, which was conducted *ex parte*, and by collusion between the said Sibley and the said Barnes, a decree of foreclosure was finally rendered, subjecting the one undivided half interest in the certain lands sought to be partitioned in this suit to said pretended mortgage; and at the foreclosure sale the said Sibley be-

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came the purchaser, for a sum nearly equal to what the said pretended mortgage was claimed to be at that time. Defendant avers that said purchase was made in accordance with said original champertous agreement, and in order to enable said Sibley to file a new bill for the purpose of partition; and defendant avers that the present bill is now filed *in accordance with said original illegal agreement between the said Sibley and the said Barnes*, with the motive and purpose of carrying out the said original agreement, in order to divide the fruit of said purchase between the said Sibley and said Barnes. And defendant avers that the sole and only title set up in this present suit is the fruit of said original agreement which the bill in No. 4762 was filed to execute in part."

Plea No. 2. "In August, 1877, this defendant went into adverse possession of the undivided one-half interest in the lands claimed by complainant in this suit, and was claiming said half interest adversely to all the world during the remainder of said year, 1877, and during the time that has since transpired, and is now holding the same adversely. While this defendant was in such adverse possession of such half interest, the said Sibley and Barnes were informed of the fact, and purchased said pretended mortgage from said executors with knowledge that said half interest which it pretended to cover was held adversely; and before said purchase was fully completed, the said Sibley and Barnes declared the fact that the validity of said mortgage would be bitterly fought, and they expressed to said executors the fact that it would be necessary for them to carry on litigation in order to enforce said mortgage against such party holding and claiming such interest adversely."

Plea No. 3. "That said mortgage made by J. H. Duvall on the 6th of October, 1869, and which the said bill in No. 4762 was filed to foreclose, became due on the 6th of October, 1871; that to said bill of foreclosure this defendant was not a party at the time the decree establishing the existence of said mortgage was made; that from the time of the maturity of said mortgage debt on the 6th of October, 1871, up to the filing of the present bill on the 6th of October, 1890—a period of nineteen years—no payment of interest, or otherwise, was ever made on account of said mortgage, so far as the evidence in said pretended foreclosure suit showed. Defendant further avers that, from the evidence taken in said foreclosure suit by said complainant, it appeared from the testimony of the executors of the said A. H. Brown that his books failed to show any indebted-

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ness from said J. H. Duvall to said Brown at the time of his death. Defendant avers that it further appeared from the evidence and admissions in said cause that, as far back as the year 1873, the said Brown had placed said mortgage in the hands of the law firm of Anderson & Bond, of Mobile, for foreclosure, and as security for the costs of said suit deposited in their hands the sum of \$100. The docket of said firm failed to show that said suit was ever brought; on the contrary, the said docket showed, opposite said cause, the following entry: '*Settled between the parties.*' Defendant avers that said mortgage was settled between the original parties thereto, and paid and satisfied, long before the pretended sale or assignment from the executors of said Brown to said Sibley and Barnes, and said mortgage was not an existing security when said foreclosure bill in No. 4762 was filed."

Plea No. 4. "Complainant should not be permitted to go further in said cause until the said Edward S. Barnes, his co-partner in the original illegal agreement, and equally interested with him in the subject-matter of this suit, shall be made a party thereto, either as complainant or defendant."

The cause being submitted for hearing on these pleas, the chancellor held the third plea sufficient and the others insufficient. The complainant appeals from this decree, and assigns as error the ruling on the third plea; and there are cross-assignments of error by the defendant, founded on the ruling as to the insufficiency of the other pleas.

R. P. DESHON, for appellant.—(1.) The first plea does not show a champertous contract, as now recognized in Alabama.—*Gilman v. Jones*, 87 Ala. 701; *Ware's Adm'r v. Russell*, 70 Ala. 174; *P. & M. Ins. Co. v. Tunstall*, 72 Ala. 148. See, also, *Story's Equity*, §§ 1039-50; 1 *Greenl. Cruise*, 1119-20; 1 *Jones on Mortgages*, §§ 788, 813; 2 *Ib.* § 1377. If the contract were champertous, the defendant can not take advantage of it in this suit. (2.) Adverse possession of the premises is no bar to a suit for partition.—*McMath v. Debaradelaben*, 75 Ala. 68. Judicial sales are exceptions to the general rule, which holds conveyances of land adversely held to be void.—*Humes v. Bernstein*, 72 Ala. 546. (3.) The third plea is not a plea of payment, nor do the facts stated raise a presumption of payment. The natural conclusion from the facts stated is, that an extension of time was granted, and the papers were withdrawn from the hands of the lawyers on that account. No presumption of payment arises until the lapse of twenty years. (4.) Barnes is not a

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necessary party to this suit.—*Dawson v. Burrus*, 73 Ala. 111. (5.) The several pleas are, in substance and effect, assignments of error on the decree of foreclosure, and seek to raise questions which are concluded by that decree.—*Otis v. McMillan*, 70 Ala. 58; *Bailey v. Timberlake*, 74 Ala. 225; *Lehman, Durr & Co. v. Shook*, 69 Ala. 491; 93 N. Y. 216; 69 Am. Dec. 178. (6.) The defendant was not made a party to the foreclosure suit, and properly so.—*Randle v. Boyd*, 73 Ala. 286; *McHan v. Ordway*, 82 Ala. 283; *Hambrick v. Russell*, 86 Ala. 199. His rights are not affected by that decree, and he has no connection with it.

HANNIS TAYLOR, *contra*.—(1.) The first plea states facts which clearly show that the complanant is seeking to enforce rights acquired under a champertous contract, and the court will not aid him.—*Holloway v. Lowe*, 7 Porter, 488; *Hilton v. Woods*, L. R. 4 Equity Cases, 432; 3 Amer. & Eng. Encyc. Law, 86-7, note 3; *Ware v. Russell*, 70 Ala. 174; *Gilman v. Jones*, 87 Ala. 691. (2.) The complainant acquired no title by his purchase at the alleged foreclosure sale, as against this defendant, who was then in adverse possession of the premises, and was not a party to the foreclosure suit. *Humes v. Bernstein*, 60 Ala. 602. (3.) Payment of the mortgage debt divests the title of the mortgagee.—Code, § 1870; *Mead v. York*, 57 Amer. Dec. 467, note; 66 *Ib.* 743, note. After the lapse of twenty years, the presumption of payment is practically conclusive.—34 Ala. 500; 54 Ala. 552; 58 Ala. 44; 54 Ala. 127. After the lapse of a less period—as nineteen years, in this case—the presumption is not conclusive, but will be drawn from circumstances of more or less weight, as weighed by the jury.—2 Jones on Mortgages, 916, and cases cited.

STONE, C. J.—This case was submitted to the chancellor on the sufficiency of four several pleas. The first, second and fourth were held insufficient, while the third was pronounced a good defense to the bill. There are cross-assignments of error, and the sufficiency of each of the pleas is thus presented for our decision.

Sibley's title, as alleged, arose as follows: In October, 1869, one Duvall executed to Brown a mortgage on an undivided half interest in certain lots of land in Mobile county, to secure a debt of \$2,500.00, due in one and two years. That mortgage was duly recorded. In November, 1888, Brown having died, his executors conveyed and transferred the mortgage and all it secured to Sibley. This mortgage

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was foreclosed by suit in chancery, instituted by Sibley in 1889, and at the sale under the decree he became the purchaser, and received a conveyance. In October, 1890, he instituted this suit.

Partition is the object of the present suit. The bill sets forth Sibley's claim and chain of title as briefly sketched above. It avers that the other undivided half interest in the lots belongs to Alba, the defendant. Only the two, Sibley and Alba, are made parties to this suit. In the bill and transcript before us, the reference to the foreclosure suit does not disclose who were defendants, other than Barnes, the administrator of Duvall. It speaks of that suit as "the case entitled *Origen Sibley v. E. S. Barnes, administrator, et al.*" We are no where informed who were the other parties defendant. We suppose they were the heirs-at-law of Duvall, the mortgagor; for, unless they were before the court, their title could not be divested. We will therefore treat this case as if they were before the court. It is proper that we should state that no intimation has been given, either in the pleadings or argument, which questions the presence of all necessary parties in the foreclosure suit.

It is not shown in the record, nor averred in the pleadings, whether or not Duvall and Alba were original tenants in common of the lots sought to be partitioned, or whether Alba claims to have acquired his interest at a later time. Neither is it denied that Duvall, when he executed the mortgage to Brown, owned an undivided half interest in the lots; nor is it claimed or averred that Alba has ever acquired that half interest by purchase or descent. The only right he relies on for maintaining his possession is, that he "went into adverse possession of said one-half interest in the lands claimed by complainant in this suit, and was claiming said interest adversely to all the world during the remainder of said year 1877, and during the time that has since transpired, and is now holding the same adversely." The bill charges that Alba and Sibley each own an undivided half interest in the lots, the latter by virtue of his purchase at the foreclosure sale; and the foregoing extract from plea No. 2 is the only statement of fact interposed by defendant, that can be construed into a denial of the averment that Duvall and Alba were tenants in common. Under this state of the pleading, we feel forced to treat this case as if Duvall and Alba were originally co-equal tenants in common.

The first plea interposed sets up the alleged champertous agreement between Sibley and Barnes, which led the former to purchase and become the owner of the Duvall claim and

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mortgage. That agreement might raise very grave inquiries in any dispute that may spring up between Sibley and Barnes. It can not in the least affect Alba, a mere stranger to the negotiation and to its consequences. The result of the authorities bearing on this question is correctly summarized in 3 Amer. & Eng. Encyc. of Law, 86, in the following language: "When an action is brought directly upon a champertous contract, champerty is a good defense, and may be set up by way of answer; and if the true character of the contract appears upon the face of the pleading, such pleading may be successfully demurred to. The better opinion would appear to be, that the defense of champerty can only be set up when the champertous contract itself is sought to be enforced." See the many authorities cited, note 3. The chancellor did not err in disallowing this plea.

Plea No. 2. We have copied above the averment found in this plea in reference to Alba's adverse holding. It is wholly insufficient to constitute his possession adverse against a tenant in common. "The seizin and possession of one tenant in common is the seizin and possession of the other or others, and an uninterrupted, exclusive possession by one is not usually deemed adverse, unless accompanied by circumstances indicating an expulsion or ouster of the other."—*Brady v. Huff*, 75 Ala. 80; *Abercrombie v. Baldwin*, 15 Ala. 363. "The possession of a tenant in common is not adverse to that of his co-tenant, unless there is an actual ouster, or refusal to let the co-tenant occupy."—*Burrus v. Meadors*, 90 Ala. 140; *Newbold v. Smart*, 67 Ala. 326; *Stevenson v. Anderson*, 87 Ala. 228. "The possession of one tenant in common, though exclusive, being consistent with the right of his co-tenant, does not amount to a disseizin of the co-tenant; and an ouster, or some act which the law deems equivalent to an ouster, is necessary to constitute a disseizin of his co-tenant by a tenant in common."—1 Amer. & Eng. Encyc. of Law, 232; *Duncan v. Williams*, 89 Ala. 341. The averments of the plea fail to show a holding by Alba, adverse to the rights of his co-tenant Brown. But, if this averment were sufficient, that would not oust the jurisdiction. The chancellor would suspend proceedings until the question of disputed ownership could be settled on an issue to be made up and submitted to a jury.—*McMath v. Debardeleben*, 75 Ala. 68.

Another view: If, when the sale was made under the foreclosure proceedings, any person other than Sibley had purchased, it would scarcely be contended, under the facts shown in the pleadings in this case, that such purchaser

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could not maintain a suit for partition. Can the fact that Sibley purchased make a difference? The rule against recovery on a title acquired while the property was held adversely, does not apply when the property was purchased at judicial sale.—*Humes v. Bernstein*, 72 Ala. 546.

The third plea sets up in defense of this suit for partition that the alleged mortgage debt from Duvall to Brown had been paid long before Sibley asserted claim to it, or procured a foreclosure of the mortgage, which culminated in his purchase of the undivided half interest. In the foreclosure suit, the heirs of Duvall were necessary parties. We suppose they were parties, and, as we have before stated, we will treat this case as if they were parties. The record before us shows that Barnes, the administrator, was a party to that suit. Plea No. 1 charges champerty, collusion and fraud between Sibley and Barnes, by which they acquired the ownership of the alleged mortgage debt, and procured the decree of foreclosure and sale under it. If the mortgage debt had been paid, and if, by collusion and fraud between Barnes and Sibley, the decree of foreclosure and the sale were brought about, then a great wrong was inflicted on Duvall's heirs; and unless, by failure to move at the proper time, they have forfeited their right to have the questions retried and the wrongs redressed, the courts and their process are open to them, and they can obtain ample redress and relief from Sibley and Barnes. This, on the cardinal principle, that fraud, if properly assailed, vitiates all transactions, no matter what form they may be made to assume. Standing, however, as the record does, and assuming that the heirs of Duvall were parties to the foreclosure suit, that record is conclusive evidence that the mortgage debt was unpaid, alike against Duvall's estate, and against all other persons who can not connect themselves with his title.

If, however, Alba has succeeded to Duvall's title or rights, not by mere adverse holding, but by purchase or conveyance, or by a subsisting, unpaid and unbarred money demand, this may open the door to him to show that the debt from Duvall to Brown had been paid before the decree in foreclosure was rendered.—*Mead v. York*, 57 Amer. Dec. 467, and note. The third plea presents no bar to this suit, and the decretal order of the chancellor holding that plea sufficient must be reversed.

Reversed and rendered, but cause remanded for further proceedings in accordance with this opinion. Let the appellee pay the costs of the appeal.

Moore, Marsh & Co. v. Penn & Co.

Statutory Trial of Right of Property in Stock of Goods.

1. *Documents copied in bill of exceptions.*—When the bill of exceptions states that certain papers or documents were read in evidence on the trial, and directs the clerk to insert them, but does not so describe them by identifying features as to leave no room for mistake by the transcribing officer, the documents inserted by him will not be considered a part of the bill of exceptions, but will be stricken out on motion; but, on the trial of a statutory claim suit, if the bill of exceptions states that the plaintiffs read in evidence the affidavit and attachment on which the suit was founded, and directs the clerk to insert them, this is sufficient to warrant their insertion, since it leaves no room for mistake.

2. *Attachment as evidence of indebtedness.*—On the trial of a statutory claim suit, the plaintiffs' attachment is sufficient evidence of the defendant's indebtedness to them when it was sued out, and the claimant can not question it.

3. *Presumption in favor of judgment.*—When the bill of exceptions purports to set out "substantially all the evidence," but nevertheless shows that some documents were introduced which are not set out, this court will presume that they justified the affirmative charge given by the court below.

4. *Sale of goods by insolvent debtor to creditor; validity as against other creditors.*—An embarrassed or insolvent debtor may sell his entire stock of goods in absolute payment of a *bona fide* existing debt, when there is no material difference between the value of the property and the amount of the debt, and no use or benefit is reserved to himself; but, when such sale is attacked by other creditors, the purchaser must satisfactorily prove the existence, amount, and *bona fides* of his debt, and the adequacy of the consideration; and if he proves only a part of his debt, it must be regarded as simulated at least to the extent of the residue, and renders the sale fraudulent in fact as against other creditors.

5. *Declarations of partner, as hearsay.*—A partner can not testify to a loan of money, or other partnership transaction, when he knows nothing about the matter except as informed by the other partners.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. JOHN MOORE.

This was a statutory trial of the right of property in and to a stock of goods, between Penn & Co., plaintiffs in attachment against Spinks Bros., and Moore, Marsh & Co. as claimants, who claimed to have purchased from said defendants prior to the levy of the attachment. The bill of exceptions purports to set out "substantially all the evidence in the case." The court charged the jury, on request, that they must find for the plaintiffs, if they believed the evi-

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dence; and this charge, to which the claimant excepted, is here assigned as error, with other rulings which require no notice. The opinion states the material facts presented on the trial below.

The bill of exceptions, as copied in the transcript first filed in this court, contained this statement: "Plaintiffs read in evidence to the jury the affidavit, attachment, and sheriff's return thereon, together with the inventory of the goods levied on by him, attached to and made a part of his return; all of which are in the words and figures following," setting them out in full. The appellees suggested to the court that the bill of exceptions was not correctly copied in the transcript, and asked a *certiorari* to perfect it; and in the copy sent up in the return, instead of the documents so set out, was the direction to the clerk: "Here copy said affidavit, attachment, sheriff's return, and inventory." At a subsequent stage of the trial, as shown by each of the transcripts, F. M. Perryman, a member of the claimants' firm, testified that, at the date of their purchase of the goods, "Spinks Bros. were indebted to his firm in the sum of \$2,938.40, as shown by two promissory notes made by them, which said notes are in words and figures following;" and the transcript first filed here set them out, while the return to the *certiorari* contained the direction to the clerk: "Here copy each of said notes." Afterwards, as shown by each of the transcripts, "plaintiffs read in evidence to the jury the deed of assignment executed by Spinks Bros. on the 14th November, 1888, which is in the words and figures following;" and the first transcript here set it out, while the return to the *certiorari* only contained the direction to the clerk, "Here copy it." After the return to the *certiorari* was filed, the appellees moved to strike out from the bill of exceptions, in the first transcript, the notes and deed of assignment therein copied, on the ground that they were not sufficiently identified to warrant their insertion by the clerk; and the cause was submitted on the merits with this motion.

THOS. L. BULGER, for appellant.

JNO. M. CHILTON, *contra*.

CLOPTON, J.—Under an order for a *certiorari*, the clerk of the Circuit Court returned a transcript of the bill of exceptions as signed by the presiding judge, from which it appears that blank spaces were left, in which some papers used in evidence were to be copied by the clerk. Appellees

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thereupon moved to strike from the bill of exceptions returned in the original transcript two notes and a deed of assignment copied in two of the blank spaces, on the ground that they were not incorporated when the bill of exceptions was signed by the judge, and are not so identified as to authorize their insertion by the clerk in making up the record. The rule is well settled, that the incorporation of any paper read or offered to be read in evidence in the bill of exceptions before it is signed, or such description by identifying features as to leave no room for mistake by the transcribing officer, is indispensable.—*Pearce v. Clements*, 73 Ala. 256. It being conceded that there is not even a pretended description of the notes, and that the description of the deed of assignment is general and indefinite, the motion to strike them from the bill of exceptions is granted.

The present proceeding is a statutory trial of the right of property to a stock of goods, levied on by attachment sued out by the appellees against the estate of Spinks Bros., to which appellants interposed a claim. On the evidence, the court gave the affirmative charge in favor of plaintiffs. The first objection urged to the charge is, that the bill of exceptions, which purports to set out "substantially all the evidence," does not show any proof that the plaintiffs were creditors of Spinks Bros. at the time of the sale of the goods to claimants, or at any other time. The objection is based on the fact that a blank space was left in the bill of exceptions signed by the judge, which is filled in the first transcript by the insertion of copies of an affidavit and attachment. On the settled rule, that the corrected transcript returned in obedience to an order for *certiorari* must be regarded as the true and correct record, so far as there is any repugnance between the contents of the first and second records, it is insisted that the principle on which the notes and deed of assignment were stricken out should be extended, so as to prevent the attachment from being considered, on this appeal, as a part of the evidence set out in the bill of exceptions; and that if the attachment be excluded, there is no evidence that Spinks Bros. were indebted to plaintiffs. Whether there is any repugnancy between the contents of the two bills of exceptions, depends on the question, whether the description in the bill signed by the judge sufficiently identifies the affidavit and attachment to justify their insertion in the blank space. The proper issue, on the trial of the right of property, is an affirmation on the part of plaintiffs that the goods levied on are subject to the attachment, and a denial by the claimants. There was but one

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attachment issued and levied on the goods; the same attachment mentioned in the affidavit and claim bond made by the claimants, which is the foundation of the trial of the right of property and of the issue joined—a part of the record. We are unable to see how any mistake could have been made by the transcribing officer. This is the certainty of identification required by the rule. If the attachment be regarded as part of the bill of exceptions, it is sufficient evidence, on the trial of the right of property, and for the purposes of such trial, of the indebtedness of the defendants in the attachment to plaintiffs, which can not be questioned by the claimants.—*Pulliam v. Newberry*, 41 Ala. 168.

While the bill of exceptions states, "the foregoing is substantially all the evidence in the case," it also states the attachment as a part of the foregoing evidence. If, then, the contention of appellants be conceded, and the attachment be regarded as stricken out, we have a bill of exceptions showing that the attachment was in evidence, and not furnishing the document itself, or a statement of its contents. In this state of the record, we are bound to presume, not being informed to the contrary, in favor of the ruling of the Circuit Court, that the attachment evidenced a debt due from the defendants therein to the plaintiffs.—*Glass v. Pinckard*, 56 Ala. 592; *Hosea v. Talbert*, 65 Ala. 175.

The consideration paid for the goods by the claimants was the payment of two notes which they alleged had been made by Spinks Bros. A transaction by which an embarrassed or insolvent debtor sells his property to a creditor, the payment of an antecedent debt being the sole consideration, is without the scope of the usual inquiries, in cases of fraudulent conveyances on a present consideration in whole or in part, as to the existence of badges of fraud, or the intent of the debtor to hinder, delay or defraud his other creditors, and participation therein or knowledge thereof on the part of the purchasing creditor. As we have repeatedly said, the material inquiries, when such transactions are assailed as fraudulent, are directed to the existence and validity of the debt, the sufficiency of the consideration, and the reservation of a benefit to the debtor.—*Hodges v. Coleman*, 76 Ala. 103; *Knowles v. Street*, 87 Ala. 357; *Harmon v. McRea*, 91 Ala. 401. This limitation upon the general rule is rested on the principle, that a debtor, devoting his property to the payment of an honest debt, performs a lawful act, which can cause no legal injury to another creditor. In order, however, that the creditor may bring himself within the protection thus afforded to a preferred creditor, he must

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satisfactorily prove the existence, amount and *bona fides* of the debt, and the adequacy of the consideration; and also show that no benefit was reserved to the debtor. If he fails to establish either the existence and validity of his debt, or that its amount is not materially less than the fair and reasonable value of the property, the law stamps the transaction as fraudulent as against other creditors.

This repetition of principles, so repeatedly and uniformly declared, is made because of their applicability to the evidence shown by the bill of exceptions, as constituting a basis of the affirmative charge. The evidence shows that the goods purchased were worth, as testified by two witnesses, sixty cents, and by another, eighty cents on the dollar, of the invoice price, which was about \$4,300.00. Taking the lowest estimate as most favorable to claimants, the value of the goods was about \$2,580.00. Perryman, a member of the firm of Moore, Marsh & Co., testified, without objection, that Spinks Bros. were indebted to claimants "in the sum of \$2,938.40, as shown by two promissory notes made by them;" and that the consideration of the note calling for \$1,369.25 was money loaned by the claimants to Spinks Bros. The bill of exceptions recites that the notes were read in evidence against the objection of plaintiffs; but, as the notes appearing in the original transcript are stricken out, neither the notes nor statement of their contents are given, otherwise than the amount of one is incidentally mentioned as above stated. It further appears that the note last mentioned, and all the witness said as to its consideration, were subsequently excluded. As this ruling constitutes an assignment of error, we may remark, that there was no error in excluding the evidence, the witness having testified, on cross-examination, that he knew nothing about the loan of the money except as informed by his partners. It was not permissible for the witness to testify to the amount and consideration of the indebtedness from what his partners told him; they should have been examined. The exclusion of the note and the testimony as to its consideration leaves no evidence of the consideration and *bona fides* of any part of the indebtedness.

But, if the existence and validity of the balance of the indebtedness testified to by Perryman, after deducting the amount of the excluded note, were conceded, and the inference most favorable to the claimants as to the value of the property allowed, the bill of exceptions presents the case, when a creditor purchases from an insolvent debtor his entire stock of goods, the sole consideration being the extin-

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guishment of a debt materially less in amount than the reasonable value of the goods. The claimants having failed to produce evidence tending to show the existence and validity of a large part of the indebtedness, which it is alleged constituted the consideration paid for the goods, it must be regarded as in fact simulated, at least to the extent of the unproved indebtedness. Such a sale is fraudulent in fact, as against the existing and subsequent creditors of Spinks Bros.—*Gordan v. McIlwain*, 82 Ala. 247. In the state of evidence shown by the bill of exceptions, the court was justified in giving the affirmative charge for plaintiffs.

This dispenses with consideration of the other rulings of the court. We are not prepared to say there is error in any of them; but, if erroneous, they worked no injury to appellants.

Affirmed.

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Statutory Action in nature of Ejectment.

95	206
97	688
95	206
105	325
95	206
113	575
95	206
121	103

1. *Failure to record deed; intervening levy of attachment.*—The failure to file a conveyance for record until the twentieth day after its date and execution does not affect its validity as against an attachment levied during the interval, especially where the attaching creditor had actual notice of the deed.

2. *Parol evidence as to consideration of deed.*—When a conveyance of land recites as its consideration the payment of money in hand, and its validity is assailed by creditors of the grantor, parol evidence is admissible to show that the actual consideration was the payment and satisfaction of an antecedent debt.

3. *Declarations as evidence; general objection to evidence partly admissible.*—Although the declarations of the grantor in a conveyance, the validity of which is attacked by creditors, as to the compensation he was paying the grantee for his services as clerk, are mere hearsay, and therefore inadmissible as evidence, where a third person testifies as to them; yet, when the witness also testifies to the compensation agreed on between them, and objection is made to his entire testimony, it may be overruled entirely, since a part of the evidence is legal.

4. *Conveyance by insolvent debtor to creditor; validity as against other creditors.*—A conveyance of land by an insolvent debtor to one of his creditors, in absolute payment of an existing debt, is not rendered invalid as against other creditors by the grantee's knowledge of the grantor's insolvency; but, if it is accompanied with the sale of a stock of goods, at a fair valuation, in payment of the balance of the debt, a small excess of about \$20 being paid by the purchaser in cash, this would invalidate the entire transaction as against other creditors;

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yet, where the bill of exceptions states that the evidence showed, without controversy, that there was no connection between the two contracts, and that the sale of the land was concluded before any negotiations were had in reference to the purchase of the goods, the implied fraud in the latter contract does not affect the validity of the former.

5. *Same; proof of payment of consideration.*—When a conveyance of property by an insolvent debtor to one of his creditors, in payment of an existing debt, is assailed by other creditors as fraudulent, the *onus* is on the grantee to establish the existence, *bona fides*, and amount of his debt, showing no material discrepancy between it and the reasonable value of the property; but, if the jury are satisfied from the evidence that the amount of the debt as claimed was due and allowed on a settlement between the parties, it is not necessary that each of the items involved should also be separately proved to their satisfaction; and a charge requested, instructing them that they must find against the deed, unless each item of the indebtedness claimed is proved to their satisfaction, is properly refused.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. JOHN B. TALLY.

This action was brought by the appellants, suing as a late partnership, against W. J. Shannon and others, to recover the possession of a tract of land, and was commenced on the 21st January, 1889. The plaintiffs claimed the land as purchasers at a sale made by the United States marshal, on the 28th November, 1887, under legal process issued on two judgments in attachment cases against M. L. Shannon, one of which was in favor of said plaintiffs; and they offered in evidence the marshal's deed to them and the judgments and proceedings in the two attachment cases. The defendants had entered into possession as the tenants of John A. Allred, who claimed under a conveyance from said M. L. Shannon, which was executed a few days before the levy of the attachments; and he having died, his heirs at law were admitted to defend on their own claim of title. The plaintiffs attacked the validity of the deed to Allred, on the ground of fraud, and the defendants adduced evidence tending to show its consideration and *bona fides*. The plaintiffs objected to the admission of the deed as evidence, and also to the evidence offered to show its consideration; and exceptions were reserved to the admission of this evidence. J. P. Greene, a witness for defendants, testified as to the consideration of the deed, stating that Allred had been in the employment of Shannon for several years; that he had several times made settlements between them, when Allred allowed Shannon to retain the amount due him, and had seen Allred lend money to Shannon at different times, in sums of \$30, \$40, \$50, &c.; and that the amount due to Allred by Shannon at the date of the deed, was about \$1,400. Being asked, on Vol. 95.

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cross-examination, "how he knew what Shannon paid Allred for his time," the witness answered, "that both Allred and Shannon told him that Shannon was paying Allred \$25 per month for his work; that he saw the books, made settlements for them, and saw Allred lend his wages to Shannon. Plaintiffs here moved the court to exclude from the jury all that the witness had said about what Shannon had said or agreed to pay Allred for his labor, on the ground that the same was illegal evidence; which motion the court overruled, and the plaintiffs excepted." The evidence showed, also, that on said 6th February, 1886, but after the completion of the contract for the sale of the land, Shannon sold and transferred to Allred his entire stock of goods, valued at \$600 or \$700, in payment of the residue of his debt to Allred, receiving \$20 or \$25 as the estimated difference; that Allred knew at the time that Shannon was insolvent, and that he was Shannon's son-in-law.

On the facts above stated, "being in substance all the evidence," the court charged the jury, on request of the defendants, as follows: "If the jury find from the evidence that Shannon, when he conveyed the land in controversy to Allred, was indebted to him in the sum of \$700, and that this was a fair and reasonable valuation of the property, and that the land transaction was consummated before the purchase of the goods; then this is a sufficient consideration for said deed."

The plaintiffs excepted to this charge, and also to the refusal of each of the following charges, asked by them in writing: (1.) "If the jury believe from the evidence that Shannon owed the plaintiffs a sum of money on February 6th, 1886, then the law casts on the defendants the burden of proving the consideration of the deed from Shannon to Allred by clear and satisfactory proof; and if the jury further find from the evidence that Allred was Shannon's son-in-law, then the law is that defendants must prove the component amounts aggregating the fair value of the lands; and if they fail to prove the different amounts by items which, added together, will show the payment of the value of the property conveyed, then it is the duty of the jury to find for the plaintiffs."

(2.) "If the jury believe the evidence, they will find that Allred either knew, or was in possession of facts calculated to stimulate inquiry; [?] and if they find the fact so to be, and that Allred, on the day the conveyance was made to him by Shannon, paid Shannon \$25 or \$30 in money, this would render the transaction fraudulent and void as to plaintiffs."

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(3.) "The law requires the defendants to show an indebtedness from Shannon to Allred equal to the fair valuation of the land conveyed on the 6th February, 1886, and if they have failed to show by clear and satisfactory proof the different items of the indebtedness, which, when added together, will aggregate the reasonable value of the land at the time it was conveyed by Shannon to Allred, then plaintiffs are entitled to judgment for the land."

(4.) "The loans of \$150, \$50, \$35, \$25, and \$50, are the only payments by Allred to Shannon established by defendants by that measure of proof which the law requires in this case, and this is insufficient to establish the *bona fides* of the deed from Shannon to Allred; and the verdict of the jury should therefore be for the plaintiffs."

(5.) "The defendants must prove the payment of the reasonable value of the land conveyed by Shannon to Allred; and if the jury believe from the evidence that the payments of \$150 at one time, \$50 at another, \$35 at another, \$25 at another, and \$50 at another, were all the payments made, as established by clear proof, then said deed is fraudulent and void as against plaintiffs, and their verdict should be for plaintiffs."

(6.) "The burden of proof is on the defendants to show by clear and satisfactory evidence that Shannon owed Allred, on the 6th Feb., 1886, an amount equal to the reasonable, market value of the land conveyed, and also to show the different amounts due by Shannon to Allred, aggregating the value of the land conveyed at the time; and unless the jury believe the evidence shows this to their satisfaction, the defendants are not entitled to recover, and the verdict of the jury should be for the plaintiffs."

(7.) "If the jury believe from the evidence that Allred got \$600 or \$700 worth of goods from Shannon on the 6th Feb., 1886, in addition to the land conveyed by deed of that date, then the duty devolves on defendants of showing by clear and satisfactory evidence the existence of an indebtedness from Shannon to Allred equal to the value of the goods and the land so conveyed; and unless the jury believe that the evidence clearly establishes this amount of indebtedness, their verdict should be for the plaintiffs."

(8.) "If the jury believe the evidence of J. P. Greene is the only evidence before them of the sale of both the land and the goods; and if they further believe that both sales were made at the same time, and that the \$25 or \$30 was paid; and if there is no other evidence of said sale, and said Greene is uncontradicted and unimpeached, they can

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not disregard his testimony capriciously; and if they believe this testimony, in connection with the other evidence, then they should find that the deed from Shannon to Allred is void, and return a verdict for plaintiffs."

(9.) "If the jury believe from the evidence that Allred bought \$600 or \$700 worth of goods from Shannon on the 6th Feb., 1886, then the burden of proof is on the defendants to show that Shannon owed Allred an amount equal to the value of the goods, in addition to the value of the land, and unless this indebtedness is shown by clear and satisfactory proof, the verdict should be for plaintiffs."

(10.) "In this case, the burden of proof is on the defendants to show by clear, satisfactory proof, the value of the consideration passing from Allred to Shannon for the property conveyed, and in the absence of such proof to the satisfaction of the jury, they should find for the plaintiffs."

(11.) "Under the law of this case, and the evidence before the jury, if they believe the evidence, the deed from Shannon to Allred, of date Feb. 6th, 1886, is fraudulent and void as against plaintiffs."

(12.) "The jury can not indulge in any presumption of payments by Allred to Shannon, but it devolves on the defendants to show by clear and satisfactory proof the payment by Allred of the value of the property conveyed; and if defendants have failed to prove this, the jury will find for the plaintiffs."

The other charges asked and refused were these: (13.) "There is no proof before the jury of an indebtedness of \$1,400 from Shannon to Allred, such as the law requires, by clear and satisfactory proof." (14.) "There is no proof before the jury of an indebtedness of \$1,400 from Shannon to Allred, and the jury will not look to any evidence about \$1,400 being due." (15.) "There is no proof before the jury of any indebtedness from Shannon to Allred of \$1,400." (16.) "If the jury believe the evidence in the case, they should find for the plaintiffs."

The rulings on evidence, the charge given, and the refusal of the charges asked, are assigned as error.

JNO. C. EYSTER, for appellants.—(1.) Plaintiffs' attachment created a lien, and the judgments obtained related back to the levy.—Code, § 2957; *Stripling & Co. v. Cooper*, 80 Ala. 256; *Scarborough v. Malone*, 67 Ala. 370; *Reid v. Perkins*, 14 Ala. 231; *Randolph v. Carleton*, 8 Ala. 606. The court therefore erred in admitting the deed to Allred as evidence, and in refusing the general charge asked by

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plaintiffs. (2.) The testimony of Greene, as to what Shannon told him he had agreed to pay Allred, was mere hearsay, and should not have been admitted. (3.) The charges asked by plaintiffs asserted correct legal principles, some of them in the exact language of former decisions of this court, and should have been given.—*Levy v. Williams*, 79 Ala. 171; *Lehman v. Kelly*, 68 Ala. 292; *Crawford v. Kirksey*, 55 Ala. 293; *Hubbard v. Allen*, 59 Ala. 283; *Thorington v. City Council*, 88 Ala. 548; *Lehman v. Greenhut*, 88 Ala. 478; *Pollock v. Searcy*, 84 Ala. 263; *Wedgeworth v. Wedgeworth*, 84 Ala. 274; *Gordon v. McIlwain*, 82 Ala. 252; *Lipscomb v. McClellan*, 72 Ala. 151.

INZER & WARD, *contra*.

MCCLELLAN, J.—1. This is an action of ejectment, prosecuted by Buford, McLester & Co., against John A. Allred and others. Plaintiffs claim under a deed executed to them by the marshal of the United States District Court for the Southern Division of the Northern District of Alabama, by whom the land was sold under a judgment and condemnation in attachment prosecuted by said plaintiffs against M. L. Shannon, for the collection of a debt existing prior to February 6, 1886. The attachment was levied on the land February 11, 1886. The marshal's deed bears date as of December 1, 1887. Defendants claim under a deed executed February 6, 1886, prior to the levy of the attachment, by Shannon, the debtor and defendant in attachment, to John A. Allred, on a recited consideration of seven hundred dollars "in hand paid." This deed was not recorded until February 25, 1886, subsequent to the levy. Shannon's insolvency at the date of his deed to Allred may be taken as having been conceded on the trial below. For all the purposes of this appeal, it may be further conceded that Allred had knowledge or notice of his grantor's insolvency. From the foregoing facts and concessions it follows, that the burden was on Allred to show a conveyance by Shannon to him in satisfaction of an antecedent *bona fide* debt, substantially equal in amount to the value of the land conveyed. In discharge of this burden defendants offered the deed which we have described. Its introduction in evidence was objected to *in limine*, on the ground that "it was fraudulent and void on its face as against plaintiffs, creditors of Shannon, in this: because said deed was executed on the 6th day of February, 1886, and was not filed for record until the 25th day of February,

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1886, and plaintiffs' lien on said property was acquired by the levy of the writs of attachments thereon on the 11th day of February, 1886." The court very properly overruled this objection. The delay in putting the deed to record shown in this case did not avoid it, as against an intervening attachment levy; and, moreover, it is not controverted but that plaintiffs had actual notice of Allred's claim of title to the land before the levy was made.

2. The assignment of error based on the refusal of the court to exclude testimony going to show that the consideration of the deed was an indebtedness from the grantor to the grantee, is untenable. This class of cases does not involve an exception to the rule that, where a particular valuable consideration, as money presently paid, is recited, another and valuable consideration, as the satisfaction of a pre-existing indebtedness, may be shown in support of the deed.—Wait's Fraud. Con. § 221; *Mobile Savings Bank v. McDonnell*, 89 Ala. 434.

3. It may be that certain declarations of Shannon, as to what he was paying Allred for his services, deposed to by the witness Greene, were not competent to prove the debt relied on by Allred as a consideration for the conveyance to him; but this witness also testified as to the compensation agreed on between Shannon and Allred as the latter's wages. We know of no more direct or approved method of establishing the fact in question than this. The motion of plaintiff in this connection was to exclude not only Shannon's declarations, but his agreement with Allred. There was no error in overruling it. *Kellar v. Taylor*, 90 Ala. 289; *Badders v. Davis*, 88 Ala. 367; *Lowe v. State*, *Ib.* 8.

4. The evidence tended to show that the whole amount of Shannon's indebtedness to Allred was \$1,400. On the day on which Allred purchased the land involved here from Shannon, in satisfaction in part of this indebtedness, he also purchased from him a stock of goods valued at \$20 or \$25 more than the balance of his claim, and paid therefor either \$20 or \$25 in money, and the balance by satisfying that part of his debt not liquidated in the land transaction. In view of Shannon's insolvency and Allred's knowledge of it, this latter transaction, involving as it did a present cash consideration in part, would have invalidated the sale and conveyance of the land, could the transactions be considered as one, or had there been any connection between the two. But that there was no such connection is put beyond a doubt, for all our purposes, by the follow-

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ing recital in the bill of exceptions: "The evidence further tended to show, and upon this point there was no controversy, that the deed for the property in suit was executed and delivered before any negotiations were had with reference to the goods; that afterwards, and perhaps on the same day, Shannon sold Allred groceries, &c., to pay balance due; that after the goods were selected and invoiced, they amounted to some \$20 or \$25 more than the balance, and Allred paid that difference in money." In view of this recital, it is not conceivable how the purchase of the goods can any way affect the prior and wholly disconnected transaction with respect to the land. Yet the objection to the charge given for the defendants, and the exceptions to the refusal by the court of charges 2, 7, 8 and 9, proceed on the theory, that the first transaction, though in and of itself *bona fide* and valid, was infected with fraud and avoided by what subsequently and wholly independently took place between the parties in reference to the stock of groceries; while charges 10 and 12 asked by plaintiffs, and refused by the court, manifestly tended to mislead the jury to the same conclusion. The assignments of error addressed to the court's action on these several charges are without merit.

5. While the burden of proving the prior existence and present satisfaction of indebtedness from Shannon to Allred, in amount equal to the value of the land, as a consideration for the deed, by clear and convincing evidence, was on the defendants, as declared in many of the charges refused to the plaintiffs, it is quite an error to suppose, as these charges further declare, that it was essential to prove each separate item aggregating the requisite sum. Cases may well be imagined—and indeed this is one of them—where proof of a gross sum found to be due, acknowledged and agreed to be paid, on a settlement between the parties, might well be entirely satisfactory to a jury, though the witnesses deposing thereto had no knowledge whatever of the dealings between the parties, or the items of debit and credit involved therein, which necessitated and led up to such settlement. Such instructions are especially pernicious in cases like this, where it appears the creditor and debtor, the only persons who ordinarily would be conversant with the itemization of the account, die before the trial is had. Charges 1, 3, 6, 11, 13, 14, 15 and 16, asked by plaintiffs, either expressly require proof of the items of the alleged indebtedness, or proceed on the theory that such proof is essential; and this though the jury might reasonably be entirely satisfied of the amount and *bona fides* of the claim from other competent

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evidence. And charges 4 and 5 were well calculated to mislead the jury to the conclusion that they could not find an indebtedness beyond certain specific sums, which one witness testified that Allred loaned to Shannon, because the alleged debt in excess of this amount was not proved item by item, though there was abundant proof, even by plaintiffs' own witnesses, that these loans did not constitute the whole indebtedness, and other evidence tending to show that, on settlements made between the parties, the balance in Allred's favor was largely more than the sum of these loans. Many, if not all of these charges, were faulty in other particulars, but it is unnecessary to further discuss them. Each of them was properly refused.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

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Action for Damages against Plaintiff in Attachment, by Assignee of Defendant.

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1. *Description of goods in complaint.*—In trespass for wrongfully seizing a stock of goods, it is sufficient to describe them in the complaint as "a stock of general merchandize formerly owned by L. & Brother, consisting of dry grods, groceries, hardware, &c., in the town of R., and in the M. building."

2. *When case or trespass lies for wrongful levy on goods.*—A claimant of goods which are in the rightful possession of the sheriff under the levy of an attachment, not having either the actual possession or the immediate right of possession, can not maintain an action of trespass against a subsequent attaching creditor; but, if the subsequent attachment is wrongfully levied on the goods, and loss or injury results to the owner, he may maintain an action on the case for damages.

3. *Whether count is in case or trespass.*—A count which claims damages for that the defendant "wrongfully caused an attachment," which he had sued out against a third person, "to be levied on a certain stock of goods which was the property of the plaintiff, but which was at that time in the possession of the sheriff under the levy of prior attachments sued out by other persons," and avers that, "by reason of such wrongful levy, said goods were wholly lost to plaintiff by the sale thereof by the sheriff under defendant's said attachment," is in case, and shows a good cause of action.

4. *Levy of attachment by constable; delivery of property to sheriff.* When an attachment is issued by a justice of the peace, returnable to the Circuit Court, and placed in the hands of a constable to be executed (Code, § 2956), if the constable delivers the property levied on to the sheriff, the latter holds it in his official capacity as sheriff, and not as a mere bailee of the constable.

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APPEAL from the Circuit Court of Randolph.

Tried before the Hon. JAS. R. DOWDELL.

This action was brought by Samuel Henderson, as assignee of A. J. Langley & Brother, against M. Joseph, and was commenced on the 4th March, 1889. The original complaint contained a single count, in these words: "Plaintiff claims of defendant \$5,000 damages for wrongfully taking the following goods and chattels, the property of the plaintiff, viz., a stock of general merchandise formerly owned by A. J. Langley & Brother, consisting of dry goods, groceries, hardware, &c., in the town of Roanoke, and in the Dave Manley building." To this complaint five pleas were filed on the 6th May, 1889, but no reference is made to them in the judgment-entry. On August 30th, 1889, the plaintiff amended his complaint by adding two more counts, in these words: "(2.) Plaintiff claims of defendant the further sum of \$5,000, for that heretofore, on," &c., "defendant wrongfully caused an attachment, sued out by himself against A. J. Langley & Brother, to be levied on a certain stock of goods in Roanoke, Alabama, said stock being general merchandise, which was the property of plaintiff; and plaintiff avers that said goods were, at the time of said levy, in the possession of the sheriff of said county, under prior attachments sued out by other parties, which had been levied on said goods, and that by reason of said wrongful levy of said defendant said goods were wholly lost to this plaintiff by the sale of said goods by the sheriff under defendant's said attachment." (3.) This count was in trover, claiming \$5,000 for the conversion of the goods.

To the complaint as thus amended the defendant demurred, assigning fourteen separate grounds of demurrer, some of which were addressed to the entire complaint, and the others to the different counts separately. The first and seventh grounds of demurrer to the whole complaint were in substance the same—a misjoinder of counts in joining the third count with the first and second. Another ground of demurrer to the whole complaint, and also to the first and second counts each, was, that the property was not sufficiently described. To the second count it was specially assigned as ground of demurrer, "(9) because, under the facts stated in said count, the plaintiff is not entitled to recover, the possession of said goods claimed to have been levied on being shown by said count to have been, not in the possession of the plaintiff, but in the custody of the law under a prior attachment which had been levied on them, by virtue of which they were in the possession of the sheriff;" and also,

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(10-11), because the said count "does not show that plaintiff was injured by the alleged levy of defendant's said attachment," "nor damaged by any act of said defendant." The court sustained the first and seventh grounds of demurrer, but overruled the others; and the complaint was then amended by striking out the third count.

To the complaint as thus amended, containing only the first and second counts, the defendant then interposed sixteen pleas, of which it is only necessary to mention the following, the fifth, sixth and seventh being addressed to the whole complaint, and the others to the second count only:

(5.) That at the time of the levy of defendant's attachment the goods were not in the possession of the plaintiff, nor had he the right to the possession thereof, but the same were in the possession of one Ford, the sheriff of the county, who held them under and by virtue of the levy of three prior attachments against said Langley & Brother, in favor of certain persons named, which said attachments were issued by a certain justice of the peace, returnable to the Circuit Court, and on each was indorsed an order directing Kent, a constable, to levy them and make return to the Circuit Court; that said attachments were levied by said constable on the goods, as the property of Langley & Brother, and the possession of the goods was by him delivered to said Ford as sheriff, who had the right to the possession and custody thereof; and that defendant's attachment came to the hands of the sheriff while he so held the possession of the goods, and was by him levied on the goods, subject to the levy of the prior attachments; and that there was no change of possession of said goods at the time of the levy of defendant's attachment.

(6.) That the goods claimed, at the time when defendant's attachment was placed in the hands of the sheriff, were in the possession and custody of said Kent as constable, under and by virtue of the levy of said prior attachments, describing them as before, "and said Kent afterwards delivered the possession of said goods to said sheriff, who held the same as the bailee of said Kent, and, while so holding as such bailee, said sheriff returned defendant's said attachment as levied on said goods."

(7.) That said goods "were never taken possession of under defendant's said attachment, by the sheriff of said county or any other person, but said goods came into the hands of said sheriff as bailee, while said attachment was in his hands, in manner following;" that is to say, said prior

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attachments, described as before, were levied on the goods by said Kent as constable; "and while holding possession of said goods under said levies he placed said goods in the hands of said sheriff, R. H. Ford, as his bailee; and said Ford, while so holding possession as bailee, returned defendant's said attachment as levied thereon, for the purpose of holding thereunder any surplus that might remain after satisfying said prior attachments so levied."

(14.) That plaintiff ought not to recover on the second count in his complaint, "because said goods, at the time of the alleged levy of defendant's attachment, were not in the plaintiff's possession, nor had he at that time any right to the possession thereof, but said goods were then in the possession of R. H. Ford, sheriff of said county, who was holding possession thereof under and by virtue of three certain attachments," describing them as above, and alleging their levy by the constable; that the constable took possession of the goods under the levy of the attachments, "and delivered said goods to said Ford, the sheriff of the county, who had the legal right to the possession and custody thereof;" and that defendant's said attachment came into the hands of the sheriff while he was so in the possession of the goods, and was levied by him on said goods, "subject to said three prior attachments;" and that "there was no change of possession of said goods at the time of said levy of defendant's said attachment."

(15.) That defendant is not guilty as charged in said second count, because said goods, at the time of the alleged levy of defendant's attachment, "had already been levied on by said Kent as constable" under said prior attachments, described as before, and were held by him under said levies when defendant's attachment was placed in the hands of the sheriff; "and that said Kent afterwards delivered the possession of the goods to said sheriff, who held the same as the bailee of said Kent, and while so holding possession as such bailee returned defendant's attachment as levied on said goods."

(16.) That plaintiffs ought not to recover under said second count, "because said goods were never taken possession of under defendant's said attachment, by the sheriff of said county or any other person, but came into the possession of said sheriff, while defendant's said attachment was in his hands, in manner following, to-wit:" that said prior attachments, described as before, were placed in the hands of said Kent as constable, and were by him levied on said goods; that said Kent, while holding possession under the

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levy of said attachments, "placed said goods in the hands of said sheriff as his bailee; and that said sheriff, while so holding possession as bailee, returned defendant's said attachment as levied on them, for the purpose of holding thereunder any surplus that might remain after satisfying said attachments previously levied."

To these pleas the plaintiff demurred, assigning 14 grounds of demurrer to each, in substance as follows: (1, 2, 3.) Said plea is no sufficient answer to the complaint. (4.) It fails to show that the goods "did not belong to the plaintiff." (5, 6.) It fails to show that the property was not sold under the defendant's attachment. (7.) It fails to aver or show that the property did not belong to Langley & Brother. (8.) It shows that defendant's attachment was levied on the property, but does not show that it belonged to plaintiff. (9.) It shows that defendant's attachment was levied on the property, but fails to show that the property was not sold under said levy. (10.) It does not show that plaintiff was entitled to the immediate possession of the property at the time of the levy. (11.) It shows that he was not entitled to the immediate possession of the property. (12.) It fails to aver any connection between Langley & Brother and plaintiff in regard to the property. (13.) It shows that defendant's attachment was levied on the property, "but fails to show that the property was not lost to the plaintiff by the sale of said property by the sheriff under defendant's attachment." (14.) It "fails to show that the goods levied on were not lost to plaintiff by the sale of said goods by the sheriff under the attachment." The court sustained the demurrer to each of these pleas, and issue was joined on the others.

The overruling of the demurrers to the complaint, and the sustaining of the demurrers to these pleas, are the only matters assigned as error.

J. M. & E. M. OLIVER, for appellant, insisting on each of the assignments of error, cited 1 Chitty's Pleadings, 392; *Sheppard v. Furniss*, 19 Ala. 760; *Ragsdale v. Bowles*, 16 Ala. 62; *Harmon v. McRae*, 91 Ala. 409; *Ginsberg v. Pohl*, 35 Md. 505.

N. D. DENSON, and WATTS & SON, *contra*.—(1.) No demurrer to the complaint was interposed after the third count was struck out by amendment, and hence the overruling of the former demurrer is not revisable.—*Gaillard v. Duke*, 57 Ala. 619; *Voltz v. Voltz*, 75 Ala. 555. (2.) If the sufficiency of the

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complaint can be considered, it can not be doubted; the first count being in trespass, and in the form prescribed by the Code, p. 791, No. 23; and the second, whether in trespass or case, showing a good cause of action. (3.) Each of the pleas was defective as a plea of justification.—*Harrison v. Davis*, 2 Stew. 350; *Burns v. Taylor*, 3 Porter, 187; *Daniel v. Hardwick*, 88 Ala. 557. Even if the attachments had been set out, as necessary in a plea of justification, they did not authorize a levy on plaintiff's property, and such levy constituted plaintiff, the sheriff, and the constable each and all trespassers.—*Harmon v. McRae*, 91 Ala. 401; *Smith v. Gayle*, 58 Ala. 600. (4.) The defendant had the full benefit of these defenses under the pleas on which issue was joined.

COLEMAN, J.—The record brings up for review only the rulings of the trial court upon the pleadings. The complaint was amended by striking out the count in trover, leaving only the first and second counts of the complaint. The first count is in trespass, and in the usual form, as prescribed by the Code. All assignments as cause for demurrer to this count, or to the complaint as a whole, were properly overruled.

There is some contention as to whether the second count is in case or trespass. Trespass and case may be joined under section 2673 of the Code. The averments of the second count show that the plaintiff was not in possession of the property, and did not have the right to the immediate possession when the levy complained of was made; but, whether in case or trespass, the demurrer to the second count raises the question as to its sufficiency to show a cause of action. A creditor who causes an attachment to be wrongfully levied upon property is equally guilty of a trespass as the officer who makes the levy. The second count does not affirm the fact that the prior attachments sued out against A. J. Langley & Brother, and which were levied upon the stock of goods, the subject of controversy, were wrongfully sued out, or wrongfully levied. Applying the rule that the pleadings must be construed strictly against the pleader, we are of opinion that this count shows that, the sheriff being rightfully in possession of the stock of goods, by virtue of the prior levy at the suit of other creditors, the defendant sued out at his own instance an attachment against Langley & Brother, and wrongfully caused the same to be levied upon the goods in question, and had the goods sold under his attachment, to the damage of the plaintiff. The goods being in "*gremio legis*," and plaintiff

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not being in actual possession, and not having the immediate right of possession according to the averments of his second count, he could not maintain trespass.—*Davis v. Young*, 20 Ala. 151; *Nelms v. Bondurant*, 26 Ala. 341; *Harmon v. McRae*, 91 Ala. 409.

Will case lie against one who causes an attachment to be wrongfully levied upon goods which are in *gremio legis*? The ownership of a defendant debtor of his chattels is not divested by the levy of an attachment—the levy only creates a lien upon the property in favor of the plaintiff.—Code, § 2957. The lien is dependent upon the judgment to be recovered, and when recovered it relates back to the levy. *Scarborough v. Malone*, 67 Ala. 572; *Cordeman v. Malone*, 63 Ala. 556. Any loss or damage sustained by the owner, the result of neglect or misconduct on the part of the sheriff, or the wrongful act of any other person, while the goods are rightfully in the possession and under the control of such sheriff as an officer of the court, may be recovered by the owner by an action on the case. Property claimed by a vendee of a defendant debtor, in some instances, may be rightfully levied upon at the suit of one creditor, and not subject to attachment at the suit of another person. When property of a defendant debtor is in the possession of the sheriff, by virtue of a levy of attachment or execution, and subsequent writs of attachment or execution are received by him against the same defendant, returnable to the same court, and to which the property is liable, a second levy by the sheriff, and indorsement thereof on the writ, subject to the prior levy, does not disturb or in any manner interfere with the *custodia legis* under the first levy. If the sheriff should undertake to displace or subordinate the prior lien secured by the first levy, he might render himself liable to the creditors holding the prior lien.—67 Ala., *supra*; 63 Ala., *supra*. This principle, however, is wholly unlike those in which, to prevent a conflict in the jurisdiction of different courts, it is held that property in *gremio legis* of one court can not be seized under process of another court, or where replevy or other bonds have been executed by the defendant in the suit, or by a stranger, by which the actual custody of the property is taken from the officer, and placed in the possession of the obligors, and held upon condition that the property be returned, &c. In cases of the latter character, the property can not be levied upon by attachment or executions against the original debtor or the claimant. The reasons are fully stated in the authorities cited. *Rives v. Welborne*, 6 Ala. 38; *Poul v. Griffin*, 1 Ala. 678;

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Cordaman v. Malone, 63 Ala. 558; *Kemp v. Porter*, 7 Ala. 53; *Dollins v. Lindsey*, 89 Ala. 219; *Harmon v. McRae*, 91 Ala. 409.

We are of opinion that the second count, when construed as an entirety, is in case, and is sufficient. True, the first clause would indicate an intention on the part of the pleader to count in trespass; but the further averments show that the injury complained of, and which damaged him, was the wrongful levy and sale of the property caused by the defendant, under his attachment, while the property was rightfully in the possession of the sheriff under prior attachment. As we have seen, damages sustained under such circumstances, give a cause of action to recover which case will lie.

Section 2956 provides, in cases of attachment issued by justices of the peace, for an amount exceeding the jurisdiction of the justice, and not more than the amount of the penalty of the constable's bond, that the justice may, by indorsement on the process, "direct that it be executed by the constable of the precinct, who shall return the same to the court to which it is returnable." Section 2958 provides for the sale of the property levied upon by order of the court, and "the proceeds of the sale be retained by the sheriff," &c.; and under section 2959 the sheriff is authorized to sell property, under certain conditions, without an order of court. We are of opinion that the property levied upon by the constable was properly delivered by him to the sheriff, and that when so delivered, it was in his possession as sheriff, and not as a mere bailee to the constable. The statute does not expressly direct the constable to turn the property over in such cases to the sheriff, but a fair construction of the several statutes, and of the duties imposed upon the sheriff, and of the fact that the writ should be directed to the sheriff, leads to the conclusion that the authority of the constable in such cases ends when he delivers the property to the sheriff, and makes his return to the proper court.

It is unnecessary to adjudicate in detail all the questions raised by the assignment of errors. We at first thought, and so stated, that the case ought to be reversed; but after a more careful examination of the pleadings, we are satisfied that the conclusions of the trial court are free from error.

Affirmed.

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Bill in Equity by Creditors, to have several Conveyances by Insolvent Debtors declared parts of General Assignment.

1. *Conveyances by insolvent debtor, as parts of general assignment* — An insolvent debtor having, under repeated decisions of this court, the right to sell and convey property in absolute payment of an existing debt, provided the price is fair and reasonable, and no use or benefit is reserved to himself, such absolute sale and conveyance will not, at the instance of other creditors, be declared and treated as part of a general assignment executed soon afterwards (Code, § 1737), though executed in anticipation of it, and with notice on the part of the creditor that the debtor intended to make a general assignment.

2. *Same* — A mortgage executed by an insolvent partnership to one of its members, to secure a debt for money loaned, which was in his hands as receiver in a chancery cause, with instructions to lend it out on mortgage of real estate, and which he allowed the firm to use without security, under the agreement or understanding, express or implied, that they would secure it by mortgage, will be declared and treated as part of a general assignment executed by the firm on the same day.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 6th July, 1891, by Henry S. Ellison and others, as creditors of Moses Brothers, a partnership lately doing business in Montgomery as bankers, against the partners composing said firm, and against M. P. LeGrand and others; and sought to have several conveyances which Moses Brothers had executed to said LeGrand, M. P. LeGrand, Jr., Josiah Morris & Co., and H. C. Moses, declared parts of a general assignment which said firm had executed on the 6th July, 1891, conveying their property to trustees for the equal benefit of their creditors. The bill described these several conveyances, and they are described with sufficient particularity in the opinion of the court; but copies of them were not made exhibits. An amended bill was afterwards filed, which alleged the resignation of H. C. Moses as receiver in the chancery cause, and the appointment of Robert Goldthwaite as receiver in his stead, and asked that said Goldthwaite be made a defendant to the bill; and a copy of the mortgage to said H. C. Moses was made an exhibit to the amended bill. Each of said defendants filed a demurrer to

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104	308
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106	471
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112	571
113	444
95	221
116	132
119	196
119	309
95	221
122	408
95	221
124	502
95	221
139	264

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the bill, and a motion to dismiss it for want of equity; and Robert Goldthwaite also filed a plea in bar, as follows: "That said H. C. Moses was appointed receiver of funds in litigation in the cause of *Paul v. Knox*, pending in this court, and said sum secured to him by said mortgage was part and parcel of said funds; that this court directed that said Moses should loan said funds to borrowers upon the security of real-estate mortgages, and said Moses held said funds for that purpose and no other; that said Moses Brothers received and used said sum so secured by said mortgage with full notice of the character of said funds and the directions of the court respecting the same, and with the intent and purpose on their part to comply with said directions, and to execute a proper mortgage on real estate for the security of said funds; that said receiver permitted and allowed the use of said funds by his firm, and parted with the control of said money, only upon the understanding that the repayment thereof should be secured by a proper mortgage on real estate, but said firm neglected to make said mortgage until the date of said mortgage of which said exhibit is a copy; and this respondent avers that the consideration of said mortgage was the passing of said money at the time it was loaned to said firm, and their acceptance of it from said receiver, with the intent on his part to require, and on the part of said firm to give, proper real-estate security therefor, and notice of the requirements of the court respecting said funds, all of which raised an implied agreement on their part, if there was no express agreement, to execute a mortgage to secure said fund; and that said mortgage was executed to carry out said obligation so resting on said firm, and is nothing more than said firm was under legal obligation to do, and is not obnoxious to the law regulating general assignments."

The chancellor sustained the demurrers and the plea, and his decree is here assigned as error by complainants.

WATTS & SON, for appellants.—(1.) The right of an embarrassed or insolvent debtor to prefer one or more of his creditors, by a conveyance of property at its fair value, in payment of antecedent debts, is recognized and admitted; but, when these conveyances are executed with the intention on his part to make a general assignment for the benefit of his creditors, and with knowledge of that intention on the part of the creditors so secured or preferred, a different question is presented. Such conveyances are to be construed as if they had been embodied in the general assign-
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ment—are parts of one and the same transaction, and the law pronounces the preference unlawful. Courts of equity look to the substance, and disregard mere devices, or matters of form.—*Holt v. Bancroft*, 30 Ala. 199; *Preston v. Spaulding*, 120 Ill. 208; *Wilks v. Walker*, 22 So. Car. 108; 66 Wisc. 227; 57 Pa. 193; 2 Serg. & R. 326; 8 Rob. La. 267, 415; *Kellogg v. Richardson*, 19 Fed. Rep. 70; *Martin v. Hausman*, 14 Ib. 160; *Krebs v. Ewing*, 22 Ib. 693; *Freund v. Yagerman*, 26 Ib. 812; *Perry v. Corley*, 21 Ib. 737. (2.) The conveyance or transfer to M. P. LeGrand, Jr., as trustee, was not made in payment of any debt which Moses Brothers owed him, but for the benefit of certain creditors whom they desired to secure or prefer; and whether he divided the property among them equally, or sold it and divided the proceeds, it is equally an unlawful preference. Moreover, the creditors' acceptance of it in full satisfaction of their debts is not averred, and is not to be presumed. (3.) The mortgage to H. C. Moses as receiver comes within the very terms of the statute, and the facts averred in the plea do not take it out of the operation of the statute. If there was an express promise to give a mortgage as security, the promise was void under the statute of frauds, unless reduced to writing; and it was void for uncertainty and indefiniteness, because no particular property was specified, and a court of equity could not have enforced it. As an implied promise, it stands on no higher ground than other unsecured debts. Besides, the statute contains an express exception of mortgages given to secure a debt contemporaneously created, and this court can not add other exceptions by implication or construction.

SEMPLE & GUNTER, and TOMPKINS & TROY, *contra*.—(1.) It has been repeatedly decided by this court that the statute relating to general assignments does not embrace conveyances of the absolute title in payment of debts, but such conveyances are governed by the rules which apply to conveyances or transfers of property by an insolvent debtor in payment of antecedent debts.—*Crawford v. Kirksey*, 55 Ala. 282; *Holt v. Bancroft*, 30 Ala. 204; *Stiles v. Lightfoot*, 26 Ala. 445; 29 Ala. 713; *Hodges v. Coleman*, 76 Ala. 203. The statute has been carried into two revisions of the public statutes since the earliest of these decisions was made, and this is a legislative adoption of that construction.—3 Brick. Digest, 749, § 1. (2.) Moses Brothers received the trust funds which were in the hands of H. C. Moses as receiver, not only with knowledge of the fact that they were trust

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funds, but with knowledge of the instructions to him as to their investment; and if they did not make an express promise to make a proper mortgage, the law imputes such promise to them and its acceptance.—*Ex parte Ford*, 16 Q. B. D. 307; *Ogden v. Saunders*, 13 Wheat. 341; *Curtis v. Fielder*, 2 Black, 478; *Cary v. Curtis*, 3 How. 247-55; 12 Wall. 12; 13 Wall. 630; 3 Pom. Equity, § 1238. When the mortgage was executed, it related back to the time when the obligation was incurred.—78 N. Y. 131; 94 N. Y. 340; 9 Ch. Ap. 752. It makes no difference if the promise was not in writing, since no one but a party can plead the statute of frauds, and the statute does not apply to executed contracts.—51 Ala. 434; 60 Ala. 214; 71 Ala. 202.

WALKER, J.—On July 6th, 1891, Moses Brothers made a general assignment of all their property for the benefit of their creditors. On the same day they conveyed to M. P. LeGrand certain property in payment of an antecedent debt due to him; to M. P. LeGrand, Jr., as trustee, certain other property in payment of an antecedent debt due to him; and executed to Henry C. Moses, as receiver in a cause pending in the Chancery Court, a mortgage on certain other property to secure a sum of money due to him as receiver. On the preceding 26th day of June they had conveyed certain other property to M. P. LeGrand, in payment of another antecedent debt then due to him; and on the 4th day of July they had transferred and delivered certain other property to Josiah Morris & Co., in payment of an antecedent debt then due to them. It is charged that the several conveyances giving preference in the payment of the debts respectively provided for were executed when Moses Brothers were utterly insolvent, and in contemplation of the general assignment; and that when the preferences were made, the several preferred creditors above mentioned well knew of the insolvency of Moses Brothers, and of their intention to make an assignment. The purpose of the bill is to have all the conveyances and transfers above mentioned declared and treated as parts of one general assignment for the benefit of all the creditors of Moses Brothers, and to avoid the preferences.

The law of this State permits an insolvent debtor to make preferences among his creditors in the payment of his debts, by an absolute sale or transfer of his property in discharge of such debts. He may convey the whole or any part of his property in payment of an antecedent debt; and if the price is reasonably fair, and there is no reservation of a

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benefit or trust in his favor, the sale is valid and will be sustained, whatever may have been the debtor's intentions, and though the preferred creditor knew of such intentions, and that the sale would leave the debtor unable to pay his other debts. That such preferences are allowable is settled by numerous decisions of this court.—*Chipman v. Stern*, 89 Ala. 207; *Hodges v. Coleman*, 76 Ala. 203; *Crawford v. Kirksey*, 55 Ala. 282; 3 Brick. Dig. 517. The statutory prohibition against preferences in general assignments (Code, § 1737) does not operate upon an absolute and unconditional sale of a debtor's property to his creditors in payment of the debts due to them. This question, also, is well settled by the former decisions of this court. The general assignment, in which preferences or priorities of payment given to one or more creditors over the others are prohibited, implies the idea of a *trust*, under the operation of which there is a possibility of a reversion to the debtor of some interest in the proceeds of a sale of the property assigned. No such idea is involved in an unconditional sale of property in absolute payment and discharge of a debt. Here the debt is extinguished, and the debtor is stripped of all interest in the property sold. Such a sale is not within the purview of the statute, and if a preference is thereby effected, it is not such a preference as the statute prohibits.—*Otis v. McGuire*, 76 Ala. 295; *Danner v. Brewer*, 69 Ala. 191; *Comer v. Constantine*, 86 Ala. 492. The result is, that the law as it now stands permits an insolvent debtor to prefer one or more of his creditors over the others in the payment of debts by a sale of property in satisfaction thereof; and prohibits preferences or priorities of payment in a general assignment by the debtor for the benefit of his creditors. Only the legislature can make the prohibition against preferences equally operative in both classes of cases. The courts must recognize and enforce the law as it exists. They can not ignore distinctions created by the law-making power.

It is not shown by the bill that any of the conveyances and transfers made by Moses Brothers in payment and discharge of certain of their debts had the features or characteristics of an assignment for the benefit of creditors, as distinguished from an absolute sale. If all the property of the debtors had been exhausted in the payment of the preferred debts, the creditors who were left wholly unprovided for would not have been entitled to disturb the sales merely because the preferences were thereby made. The validity of the sales was not affected by the circumstance that some other property was left to the debtors which they conveyed

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by a general assignment for the benefit of their remaining creditors. The complainants were not entitled to have the absolute sales and conveyances treated as parts of the general assignment. The decree of the Chancery Court to this effect was correct.

The conveyance to Henry C. Moses, the receiver appointed by the Chancery Court in the case of *Paull v. Knox*, does not purport to be in satisfaction and discharge of a debt due to him as receiver; nor does it purport to come within the exception to the statute in reference to "mortgages given to secure a debt contracted contemporaneously with the execution of the mortgage, and for the security of which the mortgage was given."—Code, § 1737. It is a mortgage executed to secure the repayment of the amount of certain trust funds which had come to the hands of Henry C. Moses as receiver, subject to the directions of the court to lend the same upon the security of real estate mortgages. He allowed the firm of Moses Brothers, of which he was a member, to use these funds, without furnishing the security upon which he was authorized to lend them. It does not appear how long they had had the use of these funds before the mortgage in question was executed. The plea on the subject does not allege that, at the time the funds were appropriated and used by the firm, there was any express agreement on their part to give the proper real estate security for the repayment thereof. The averments of the plea show no more than that the receiver's permission of the use of the funds by his firm, and their acceptance of them with notice of the requirements of the court in reference thereto, raised an implied agreement on their part to give the proper real estate security; and that the execution of the mortgage by Moses Brothers, after they had received and used the funds, was merely the performance of the duty imposed upon them in the premises.

The mortgage in question and the instrument which is a general assignment on its face were executed on the same day, and the bill alleges that they were parts of one and the same transaction. The property conveyed by the mortgage is, by the terms thereof, redeemable on the payment of the debt thereby secured—by the express terms of the instrument a trust results to the debtors, of any surplus which may remain after satisfying the debt. It was merely a provision for payment by the appropriation of certain property, or the proceeds of the sale thereof, to that end, and not a payment itself. These are distinguishing characteristics of the transfer in which preferences are avoided by the statute, if

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substantially all of the debtor's property is covered thereby; and though the mortgage, if standing by itself, would be regarded as only a partial assignment, and not within the operation of the statute; yet, if when it was executed, other and successive transfers or conveyances of a kindred nature were contemplated, covering all the debtors' property, the several conveyances, when executed, must be taken together as forming a *general* assignment, upon which the statute operates, unless, by reason of some special feature or circumstance, the mortgage is withdrawn from the influence of the statute.—*Danner v. Brewer*, 69 Ala. 191; *Holt v. Bancroft*, 30 Ala. 93; 3 Brick. Dig., pp. 49, 50.

What was the character of the liability incurred by Moses Brothers by their appropriation and use of the funds entrusted to the receiver, without furnishing him the security which, by the order of the court, he was required to take upon a loan of the money? Is there anything in the mortgage subsequently executed as security for the liability thus incurred to exempt it from the operation of the statute prohibiting preferences or priorities in general assignments? It is clear that the receiver, in permitting and allowing the use of the trust funds by his firm, and in parting with the control thereof, without requiring the execution of a mortgage or mortgages on real estate to secure the loan, as directed by the order of the court, was guilty of a conversion, which imposed a personal liability upon him and upon his firm, who received the money with notice of the breach of trust.—*DeJarnette v. DeJarnette*, 41 Ala. 708; *Henderson v. Henderson*, 58 Ala. 582; *Malone v. Kelly*, 54 Ala. 549. It is equally clear that the trust funds could be followed into the hands of any one who received them charged with notice of the trust, or into any unauthorized investment of them by the trustee, to which they could be traced.—*Reed v. Bank of Mobile*, 70 Ala. 199; *Whaley v. Whaley*, 71 Ala. 159; 3 Brick. Dig., p. 796. Here, there is no question of tracing and identifying the funds in the hands of Moses Brothers. There is no pretense that they had invested them in the property upon which the mortgage was given. They had simply converted the money, mingled it with their own funds, and used it in some way which is not disclosed. The consideration of the mortgage was the personal liability incurred by the unauthorized use of the trust funds. Moses Brothers having used the funds with notice of their trust character, and of the directions of the court as to the mode of their investment, their liability was similar to that incurred by the trustee himself by his breach of trust. In

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reference to the liability in such case of the trustee to the *cestui que trust*, it was said in *Lathrop v. Bampton*, 31 Cal. 23: "Where a trustee, in violation of his trust, invests the trust property or its proceeds in any other property, the *cestui que trust* may elect to hold the substituted property subject to the trust, or to hold the trustee personally liable to him for the breach of the trust. The former he can do, however, only when he can follow and identify the property, either in its original or substituted form. . . . If this can not be done, the right of the *cestui que trust* to elect is gone, because its exercise has become impossible, and he is therefore forced to rely upon the personal liability of the trustee. . . . When thus forced to rely upon the personal liability of the trustee, a *cestui que trust* occupies a position towards the estate of the trustee which is no better, but is identical with, that of a simple-contract creditor. He has no special lien upon the general estate of the trustee which is superior to that of any other creditor; for the specific property covered by the trust is gone, and nothing is left to the *cestui que trust* except a naked claim for damages generally, on account of the breach, to be obtained through an action at law, attended by all the incidents of a like action on behalf of one who is not the beneficiary of a trust." What was there said is in harmony with the former decisions of this court. The rule is well settled, that the *cestui que trust* is entitled to have the trust visited upon any property into which the trust funds have been invested by the trustee in breach of his duty, or by any third person with notice of the trust, so long as such funds can be satisfactorily traced and identified. But, in case of a mere money trust, when the money has been mingled with the funds of the trustee, or of another person, so that it can not be distinguished and identified, and can not be traced into any particular property, there is no longer any specific thing upon which the trust may attach; and, in such case, nothing is left to the *cestui que trust* but the moneyed liability in his favor of the trustee, or of the third person who has used the fund with notice of its trust character; and such liability stands upon the same footing as a mere debt, and the *cestui que trust* has no advantage over a general creditor.—*Parker v. Jones*, 67 Ala. 234; *Goldsmith v. Stetson*, 30 Ala. 164; *Stewart v. Fry*, 3 Ala. 573; *Maurv v. Mason*, 8 Porter, 211. Indeed, the trustee's personal liability to make compensation for the loss occasioned by a breach of trust, is a simple-contract equitable debt. *Vernon v. Vaudry*, 2 Atk. 119; *Benbury v. Benbury*, 2 Dev. & Vol. 95.

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Bat. Eq. (N. C.) 235; 2 Pomeroy's Eq. Jur. § 1080; 2 Lewin on Trusts (Flint's ed.), *906.

It may be conceded that a promise by Moses Brothers to give a mortgage on real estate, to secure the amount of the trust funds which came to their hands and was converted by them, may be implied from their acceptance and use of the funds, with notice of the direction of the court that such security should be taken by the receiver upon a loan of the funds by him. There is, however, nothing upon which to raise an implication of an agreement by Moses Brothers to give a mortgage upon all their real estate, or upon any particular real estate. If they had entered into a written agreement to give a mortgage on certain land, this would have fixed an equitable lien thereon, and the giving of the mortgage could have been regarded as the performance of an executory agreement to furnish that specific security. 2 Pomeroy's Eq. Juris. § 1237; *Kirksey v. Means*, 42 Ala. 426; *Mobile & C. P. R. Co. v. Talman*, 15 Ala. 472. Upon such a state of facts, liens which, otherwise, would have been invalid, were sustained in several cases, which were referred to in the argument for the appellees.—*Paulling v. Chrome Steel Co.*, 94 N. Y. 334; *Castle v. Lewis*, 78 N. Y. 131. In the absence, however, of any agreement to secure the repayment of trust money by a lien or charge upon property which can be identified, if the money has been received and dissipated, or so mingled with other funds that it can no longer be distinguished, then no particular property can be arbitrarily selected and treated as the trust estate in a substituted form. The mere personal obligation of the debtor to repay the money, or to secure its repayment by a lien upon property not identified, can not operate to fix a lien upon any specific property, or to stamp upon the legal title thereto the qualities of a trust, so as to give the *cestui que trust* an equitable interest therein, or claim thereon. In such case, there is no specific property as to which the *cestui que trust* can be regarded as the equitable owner, or as the beneficiary of an equitable lien or charge. His available claim is narrowed to a mere debt, and he has only such right to reach and subject the debtor's property as any other general creditor has. Upon no part of the debtor's property is there a special charge for the payment or security of the personal claim against him, growing out of the breach of trust. In the present case, when the receiver surrendered the control of the trust money, and permitted it to be mingled with the funds of his firm, the only recourse left to him for indemnity by the firm was the

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personal liability incurred by their participation in the breach of trust. The debtor firm had no more right to provide for a preference or priority of payment of such claim in a general assignment of their property, than they had to provide for such preference or priority of payment in favor of any other one or more creditors over their remaining creditors.

Under the averments of the bill as amended, the mortgage to Henry C. Moses, receiver, and the instrument which is a *general* assignment on its face, must be taken together as constituting one transaction, by which provision was made for the payment of the debts of the grantors, but which did not by itself effect a payment and discharge of such debts—in other words, the transaction was a general assignment. And as the mortgage undertakes to give a preference or priority of payment of the debt therein provided for, the other creditors are entitled to have that attempted preference avoided, and to have the security of the mortgage enure to the benefit of all the creditors of the grantors alike.

The Chancery Court erred in sustaining the plea of Robert Goldthwaite as the receiver appointed to succeed Henry C. Moses. Because of that error the decree must be reversed. The costs of the appeal in this court and in the Chancery Court to be paid, one half by the appellants, and one half by the appellee Goldthwaite as receiver.

Reversed and remanded.

THORINGTON, J., not sitting.

Kearney v. Kling.

Action on Guaranty for Performance of Charter Party.

1. *Issue on defective plea.*—When issue is joined on a defective plea, and the evidence clearly establishes its truth, the court should instruct the jury, on request, to find for the defendant if they believe the evidence, leaving the plaintiff to ask a replender.

2. *Cross errors neutralizing each other.*—There possibly may be conditions in which this court would hold that an error prejudicial to the appellant was neutralized by another error in his favor, and on that account refuse to reverse; but, to justify such ruling, it must affirmatively and clearly appear that no injury was done; and this does

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not appear when the record does not satisfactorily show that all the meritorious questions in the case were presented and decided in the court below.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by August Kling against Philip Kearney, and was commenced on the 17th February, 1890. The action was founded on the defendant's written guaranty of the performance by Peter Burke, as charterer of the steamboat *Lillie*, of all the stipulations and obligations imposed on him by the charter-party, which was in these words:

"State of Alabama, } This charter-party, entered into
Mobile County. } by and between August Kling, owner
of the steamboat *Lillie*, of the first part, and Peter Burke of
the second part, witnesseth: (1.) August Kling, of the
first part, agrees to charter to Peter Burke the steamboat
Lillie, for the term of five (5) months, at and for the sum of
\$60 per month, payable monthly, which said Burke doth
agree so to pay. (2.) It is hereby agreed that the said
Peter Burke shall assume all liabilities of any and all kinds
arising from or suffered by the said *Lillie* during the con-
tinuance of this charter-party. (3.) The said Burke is to
insure the said *Lillie*, if she can be insured, in and for the
benefit of said August Kling, for the sum of \$1,500, he, the
said Burke, paying all the premiums on said insurance
policy; and said policy is to be delivered to the said Kling
within two weeks from the signing of this charter-party.
(4.) It is expressly agreed and understood that the said
Burke shall not run said *Lillie* into debt; that he is to create
no debts or liabilities on said vessel of any kind; and he
does hereby covenant and agree to keep the said vessel free
from any and all debts of any kind, and to hold said August
Kling and said vessel harmless from any and all debts or
liabilities that may or shall be created, or sustain [ed] or
accrue, during the continuance of this charter-party. (5.)
The said Burke doth agree to return the said steamboat
Lillie to August Kling, in the city of Mobile, State of Ala-
bama, upon the expiration of this charter-party, in the same
condition as when received, ordinary wear and tear excepted.
If said *Lillie* should sink, the said Peter Burke is to do all
in his power to raise her. (6.) It is mutually agreed
between the parties, that if said Peter Burke, at any time
during the continuance of this charter-party, should con-
clude to purchase the said steamboat *Lillie*, the said August
Kling doth hereby agree to sell her to him for the sum of

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\$1,000 in cash; and it is understood that, in that event, the amount said Burke shall have paid said Kling as charter money shall be allowed to him as so much paid on the one thousand dollars. To all of which we hereunto set our hands and seals, Sept. 14th, 1889." (Signed by both parties.)

The defendant's guaranty, also dated September 14th, 1889, was in these words: "For and in consideration of the chartering or letting of such steamboat *Lillie* by the said August Kling to the said Peter Burke, and for the sum of one dollar, I hereby become surety for the punctual payments of the said \$60 per month, and the performance of the agreements and covenants in the above written agreement or charter mentioned, to be paid and performed by Peter Burke; and if any default shall be made therein, I do hereby promise and agree to pay unto said August Kling such sum or sums of money as will be sufficient to make up such deficiency, and fully satisfy the conditions of the said agreement, without requiring any notice of non-payment, or proof of demand being made. Given under my hand," &c. The opinion states the other material facts.

PILLANS, TORREY & HANAW, for appellant.

OVERALL & BESTOR, *contra*.

STONE, C. J.—(The reporter will set out a copy of the contract of lease, or charter-party, by which Kling let or hired the steamboat "*Lillie*" to Peter Burke, and a copy of the guaranty entered into by Kearney as Burke's surety.)

The complaint contains two special counts, and each count sets out *in extenso* a copy of the contract between plaintiff and Burke, and a copy of Kearney's guaranty of Burke's faithful performance. Burke leased the boat from Kling September 14, 1889, was to man and run her on his own account, and return her at the end of the lease, February 14, 1890, in the same condition as when received, "wear and tear excepted."

No ruling appears to have been had on the first count, and we will not notice it. The case was tried on the second count, and the only breach assigned in it was and is, "that said Burke has committed a breach of said contract or charter-party in this, that he has failed and refused to return said steamboat *Lillie* to plaintiff at Mobile, Alabama, after the expiration of said charter-party." There was a demurrer to the complaint, assigning grounds; but as there

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is no assignment of error which brings up the ruling on the demurrer, we will not consider it.

Defendant Kearney then filed eight pleas to the complaint. The *first* was, that at the time of the charter the steamboat *Lillie* was not river-worthy, and was not fit for carrying freight and passengers up and down the Mobile and Tombigbee rivers. *Second*, that in consequence of said river unworthiness, and not from any peril of the navigation, said steamboat sprung a leak, and was lost on her first voyage. *Third*, that by said charter-party Kling warranted that the steamboat "was in all respects fit and suitable in strength, structure and condition to carry a cargo in the river trade;" and defendant then negatived these qualities, and averred that on her first trip, in less than a month after the contract, from no peril of the navigation, but from her own unfitness and river-unworthiness, she sank and was lost. *Fourth* plea avers that, by force of the contract, plaintiff was bound to see that the boat was river-worthy and in suitable condition for the service, and neglected to do so; and that in less than a month the boat was lost in consequence of her own river-unworthiness. *Fifth*, that the boat sunk and perished in less than a month after she was chartered, before any hire had accrued. *Sixth*, same as fifth, with the additional averment that the boat was lost without the fault of Burke or defendant. *Seventh*, that the boat was lost on her first voyage, from no peril of the river, but from inherent weakness and river-unworthiness, and that it was not in Burke's power to raise her. *Eighth*, that the steamboat, by her own inherent weakness and river-unworthiness, was rendered incapable of being returned to plaintiff.

Plaintiff demurred in gross to the first, second, third, fourth, seventh and eighth pleas of defendant, "raising the question of river-unworthiness." He assigned grounds of demurrer: *First*, "because by the terms of said contract of charter-party defendant's principal hired said boat as she was, and expressly agreed to return her to plaintiff in same condition as when received." *Second* assignment is not materially different from first. *Third* assignment denies that by the terms of the charter-party there is any warranty of the river-worthiness of the steamboat. *Fourth* assignment is substantially like the first and second. Plaintiff also demurred "to the fifth and sixth pleas, because they present no issue of law or fact." The court overruled these demurrers, and the plaintiff then took issue on the pleas.

The contract, or charter-party, contains no express guaranty, or other provision in reference to the soundness or

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river-worthiness of the steamboat *Lillie*. If there was any guaranty, it was one implied from the nature of the contract.

We have stated above that the only breach of Burke's contract stipulations which is assigned in the second count is, that he failed and refused to restore the steamboat to Kling. The contract, or charter-party, expressly imposes many duties on Burke. We mention only two of them. "*Third*: The said Peter Burke is to insure the said '*Lillie*,' if she can be insured, in and for the benefit of said August Kling, for the sum of fifteen hundred dollars; he, the said Burke, paying all the premiums on said insurance policy, and said policy to be delivered to said Kling within two weeks from the signing of this charter-party. . . . "*Fifth*: The said Peter Burke doth agree to return the said steamboat '*Lillie*' to August Kling, in the city of Mobile, State of Alabama, upon the expiration of this charter-party, in the same condition as when received, ordinary wear and tear excepted. If said '*Lillie*' should sink, the said Peter Burke is to do all in his power to raise her."

The testimony without conflict surely proved the truth of defendant's fifth plea. The only averment of fact set up by that plea in bar of plaintiff's action was, "that said vessel sunk and perished before a month had run and any payment of hire had accrued." On this plea plaintiff had taken issue; and when its truth was proved, defendant was entitled to a verdict. Defendant had in writing requested the court to charge the jury, that if they believed the evidence they must find for the defendant; and the court had refused to so charge. This was excepted to, and is assigned as error. In the then state of the pleadings, this charge ought to have been given.—*Crescent Brewing Co. v. Handley*, 90 Ala. 486.

This plea had been demurred to by plaintiff, and the demurrer overruled. The plea being insufficient, if defendant had succeeded in the court below, and plaintiff had appealed, we would have reversed the judgment of the Circuit Court overruling the demurrer to the fifth plea. So, if defendant had succeeded in obtaining a verdict on the fifth plea, it is not impossible that plaintiff would have moved for a repleader.—*Mulge v. Treut*, 57 Ala. 1; *Irion v. Lewis*, 56 Ala. 190; *Ga. Pac. Railway Co. v. Propst*, 90 Ala. 1. In view of these principles, there possibly might be conditions in which we would hold that one error had neutralized the other, and on that account refuse to reverse. To justify such possible ruling, it would be necessary for the record to show affirmatively and clearly that no injury was done. The record before us is not in a condition to authorize us to make that

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statement. It is not satisfactorily shown that all the meritorious questions which arise out of this transaction have been raised by the pleadings, or passed on in the court below. We state some inquiries which suggest themselves, which should be probably considered on a second trial; but we must not be considered as intimating a positive conviction in regard to them.

The contract being in writing, all its provisions must be taken into the account in giving it its proper interpretation. The inquiries we suggest are: *First*, does the contract impose on Burke an unconditional liability to return the vessel at the expiration of the lease? Does not the clause, "If said 'Lillie' should sink, the said Peter Burke is to do all in his power to raise her," relieve him of such absolute liability? *Second*, does not that clause impose on Peter Burke the duty of doing all in his power to raise the vessel if she sunk, or to show that such efforts would be fruitless, and that she could not be raised? *Third*, was it not Burke's duty to insure the vessel before starting her on a voyage, or to show he could not obtain insurance on her; and are not the two weeks allowed for delivering the policy confined to the mere act of delivery, without enlarging the time for suing out the policy?

Reversed and remanded.

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Bill in Equity for Injunction against Trespass.

1. *Mineral rights severed from ownership of soil.*—A grant or reservation of the minerals in a tract of land, severed from the ownership of the surface, carries with it the right to penetrate through the surface to the minerals, for the purpose of mining and removing them, by the adoption and use of such machinery, methods, appliances and instrumentalities as are reasonably necessary and ordinarily used in such business; and, it may be, for the deposit or storage of the minerals in their first marketable state, until they can be transported with reasonable diligence. But these incidental rights must be exercised with due regard to the rights of the owner of the soil, without injury to his right of support for the surface, and without any permanent damage thereto, not necessary to the proper and beneficial enjoyment of the right to mine; they cease when the minerals on the land are exhausted, and do not justify the use of the surface for the deposit, loading and transporting of minerals taken from other adjacent lands.

2. *Injunction against trespass.*—As a general rule, a court of equity

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will not grant an injunction to restrain the commission or repetition of a trespass, when the trespasser is solvent, and an action at law for damages affords an adequate remedy; but there are injuries, sometimes arising from the peculiar nature or use of the property, which can not be adequately compensated by an action at law for damages; and when the injuries are continuous, or permanent in their effects, destroying the substance of the inheritance, ruining the estate, or permanently impairing its future use and enjoyment in the manner in which the owner has been accustomed to use and enjoy it, pecuniary compensation is inadequate, and an injunction will be awarded.

3. *Same*.—A court of equity will grant an injunction at the suit of the owner of the surface of lands which are valuable for agricultural and grazing purposes, against the owner of the minerals and mineral rights, to restrain him from depositing on the land foul water, slate, and other noxious substances brought up through the opening from subjacent lands which he is mining.

APPEAL from the Chancery Court of Walker.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 1st June, 1891, by John de B. Hooper against the Dora Coal Mining Company, a private corporation, to enjoin and restrain the defendant from depositing on a tract of land, of which the complainant claimed to own the surface, foul water, slate, and other noxious substances, brought up through the opening of the defendant's mine on the land, from other subjacent lands which the defendant was also mining. The material allegations of the bill are stated in the opinion of the court. The Chancery Court sustained a demurrer to the bill, on the ground that the complainant had an adequate remedy at law, and this decree is now assigned as error.

JOHN J. MOORE, and B. K. COLLIER, for appellant.—The bill shows permanent and irreparable injury, for which an action at law for damages would not afford adequate compensation, and therefore makes a case for an injunction. High on Injunctions, §§ 697, 701; *Chambers v. Ala. Iron Co.*, 67 Ala. 353; *Nininger v. Norwood*, 72 Ala. 277; *Ogletree v. McQuaggs*, 67 Ala. 580; *Sullivan v. Rabb*, 86 Ala. 433; *Osborn v. U. S. Bank*, 9 Wheat. 738; *Watson v. Sutherland*, 5 Wall. 74; *Clark v. Railroad Co.*, 44 Ind. 248; *Schneider v. Brown*, 85 Cal. 205; *Lembeck v. Nye*, 47 Ohio, 336; *Gilchrist v. Vandyke*, 21 Atl. Rep. 1099; *Pusey v. Wright*, 31 Penn. St. 387; *Grant v. Crow*, 47 Iowa, 632; 56 Cal. 155, 161; L. Rep. 7 Ch. 699.

COLEMAN & SOWELL, *contra*, cited Bainbridge on Mines & Mining, 35, Amer. ed.; *Williams v. Gibson*, 84 Ala. 228; *Turner v. Reynolds*, 23 Penn. St. 199; *Wood v. Sutcliffe*, 42 Eng. Vol. 95.

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Ch. 165; *Clifton Iron Co. v. Dye*, 87 Ala. 468; *Thomas v. James*, 32 Ala. 723; *Brooks v. Diaz*, 35 Ala. 599; *Mulvany v. Kennedy*, 26 Penn. St. 44; *Hatcher v. Hampton*, 7 Geo. 49; *Waldron v. Marsh*, 5 Col. 119; 12 Nev. 251; *Jerome v. Ross*, 7 John. Ch. 334; Hilliard on Injunctions, 322, § 3; High on Injunctions, 3d ed., 546, § 706.

PER CURIAM.—The bill alleges that complainant is the owner of the land therein described, "except all the coal and other minerals in, under, and upon said lands, and also except all timber and water upon the same necessary for the development, working and mining of said coal and other minerals, and the preparation of the same for market, and the removal of the same; and also the right of way, and the right to build roads of any description over the same necessary for the convenient transportation of said coal and other minerals from said coal lands, and the conveying and transporting to and from said lands all materials and implements that may be of use in the mining and removal of said coal and other minerals, or in the preparation of the same for market." It further alleges that defendant has opened a mine on the land, and erected thereon a tram-way, bridges, trestles, weigh-houses, blacksmith-shops, and other buildings and works used for mining coal; that the company has ceased to mine the coal lying beneath the surface of the land to any appreciable extent, and has extended the openings of the mines to adjacent lands, from which large quantities of coal are mined, using the plant upon complainant's land to load and transport such coal, not for loading and transporting coal mined beneath the surface of complainant's land. The bill further avers, that the land of complainant is very valuable for agricultural and grazing purposes; and that the defendant, its agents or employes, dump vast quantities of slate and other obnoxious refuse, taken from the mines on the adjacent lands, on to the agricultural and grazing lands of complainant; that they also permit vast quantities of foul water to accumulate in the mines of the adjacent lands, which, by means of machinery, is ejected upon the surface of complainant's lands. The bill, which is filed by appellant, seeks to restrain appellees from using complainant's land for the purpose of loading and carrying away coal mined on such adjacent lands; also, from dumping on to complainant's land slate, refuse water, and other substances and fluids taken therefrom. The court overruled all the grounds of demurrer to the bill, except the second, which is to the effect that complainant has an adequate remedy at law.

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It will be observed that the case made by the bill is of a mixed character—one where the surface is used for the purpose of mining the subjacent minerals to a small extent, and where it is used for the purpose of working mines on lands lying adjacent to a much greater extent. The bill does not inform us whether the right of defendant to mine is by reservation in a deed to the surface, or by a grant of the minerals, the grantor reserving to himself the surface; but this is immaterial—the relative rights and duties of the parties are the same. It is well settled, that where one person is the owner of the surface, and another of the subjacent minerals, the surface is servient to the mining right as to the occupation and use of so much as may be reasonably necessary for the beneficial and profitable working of the mines. A reservation or grant of the minerals, severed from the ownership of the surface, carries with it the right to penetrate through the surface to the minerals, for the purpose of mining and removing them. This includes the adoption and use of such machinery, methods, appliances and instrumentalities as may be reasonably necessary, and are ordinarily used in such business; and it may be, for the storage of minerals in the first marketable state until they can be transported with due diligence.—*Williams v. Gibson*, 84 Ala. 228. These incidental rights must be exercised with due regard to the rights of the surface-owner, without injury to the right of support for the surface, and without any permanent damage thereto, not necessary for the proper and beneficial enjoyment of the right to mine. It has been said: "The incidental power would warrant nothing beyond what is strictly necessary for the convenient working of the coal; it would allow no use of the surface, no deposit upon it to a greater extent, or for a longer duration than should be necessary, no attendance upon the land of unnecessary persons."—*Cardigan v. Armitage*, 2 Barn. & Cress. 197. Possibly, under our rulings, the adverb "strictly" confines the use of the easement within too narrow limits. "Reasonably necessary" is the language of this court, and we prefer to make no change in a rule which we consider so conservative.—*Williams v. Gibson*, 84 Ala. 228, 232. It does not allow defendant to use the surface for the deposit of slate, or other refuse matter, taken even from the mines underneath.—*Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; 14 Am. Rep. 322.

The right to use the surface, implied from the reservation or grant, arises from, and ceases with, the necessity of the case. When all the subjacent ore is dug and removed, and

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the mine is exhausted, there no longer exists any necessity for the use of the surface. Without an express reservation or grant, the right to use the plant erected on the surface of complainant's land, for the loading and transporting of coal mined on adjacent lands, does not exist.—*Midgely v. Richardson*, 14 M. & W. 595. As regards the dumping of slate and other obnoxious substances, and ejecting foul water on complainant's land, the liability of defendant is the same as that of a party who occasions injury to land unconnected with the land in which the mines are worked—the same as if he were not owner of the minerals on complainant's land.

The grounds of demurrer, raising the question as to the right of defendant to use complainant's land for loading and transporting coal mined on other lands, and for the deposit of such substances, whether taken from the subjacent mines or others, having been overruled, the direct and sole question is, whether, on the facts averred in the bill, an injunction will lie to prevent such injuries. The foregoing principles have been stated as aiding its determination. Under the averments of the bill, dumping the slate and other substances on complainant's land is clearly a trespass. As a general rule, an injunction will not be awarded, in the absence of special circumstances, to restrain the commission or repetition of a trespass, when an action at law for the recovery of damages affords an adequate remedy. But the jurisdiction is well established, when from the peculiar nature or use of the property, or the probability of a multiplicity of suits arising from the frequent and continued repetition of the trespass, the injury can not be adequately compensated by an action for damages. It is difficult to define with any degree of definiteness what will constitute such irreparable injury as to warrant the interposition of the extraordinary but conservative remedy of injunction. The general rule is, that when the trespass is of a temporary nature, or of such character and effect as may be readily compensated in damages, the trespasser being solvent, equity will not depart from the settled rule to leave the aggrieved party to his remedy at law. As to the jurisdiction of equity in such cases, there is a well-recognized distinction between injuries temporary and fugitive in their nature, and injuries permanent, continuous, and of frequent occurrence. The former may be readily redressed at law; but, when the injuries are of the latter character, which destroy the substance of the inheritance, or ruin the estate, or permanently impair its future use and enjoyment in the manner in which the owner has been accustomed to use and enjoy it, pecu-

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niary compensation is inadequate, and equitable interference demanded.—*Mayor v. Groshow*, 30 Md. 505; *Nininger v. Norwood*, 72 Ala. 277. In *Hobbs v. Amadore and Sa. C. Co.*, 66 Cal. 161; it was held an unlawful act for a company engaged in mining to so work over and use the mine as either directly or indirectly to cover the land of another with the sand, gravel and debris from such mines, thereby rendering it valueless for agricultural purposes, and that such acts will be restricted by injunction.

It is true the averments of the bill are general, and might have been more definite and precise as to the extent of the injury, present and prospective; but they are sufficient to make a case of irreparable injury within the meaning of that term, as understood and employed in equity jurisprudence. Defendant, having become possessed in a lawful way of a location on the surface of complainant's land, and having nearly exhausted the subjacent coal, extended the opening of its mines into adjacent but unconnected lands, brings the coal therein mined to the surface of complainant's land to be there loaded and transported, and deposits on his land noxious refuse substances and foul water. The frequent and continuous deposit of vast quantities of slate on lands valuable and used for agricultural or grazing purposes, and the emptying of foul or filthy water thereon, pumped from mines where suffered to accumulate, certainly deteriorates its value and usefulness for such purposes, and permanently injures its future use and enjoyment, producing irreparable injury, to redress which pecuniary compensation is inadequate.—*Sullivan v. Babb*, 86 Ala. 433; *Ogletree v. McQuaggs*, 67 Ala. 580.

The case made by the bill comes within the rule stated above, and the demurrer should have been overruled.

Reversed and remanded.

The opinion in this case was prepared by the late Mr. Justice CLOPTON, and was adopted by the court after his death.

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Turner v. Bernheimer.*Statutory Action in nature of Ejectment.*

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1. *Conveyance of homestead by husband to wife.*—A conveyance of the homestead by the husband to the wife, delivered to and accepted by her, is not an *alienation* of the homestead within constitutional and statutory provisions (Code, § 2508), and does not destroy or affect its character as a homestead, but is effectual to convey to the wife the legal title to the land, on which she may successfully defend an ejectment suit brought by a subsequent purchaser at execution sale against the husband.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by Charles Bernheimer against Lewis W. Turner and his wife, Mrs. Sarah A. Turner, to recover the possession of a house and lot in the city of Mobile; and was commenced on the 4th April, 1891. The defendants pleaded not guilty, and the cause was tried on issue joined on that plea. The plaintiff claimed the land as purchaser at execution sale against said L. W. Turner, on the 25th August, 1890; the execution having been levied on the 23d June, 1890, and issued on a judgment against said Turner rendered on the 23d April, 1890, in favor of a partnership of which the plaintiff was a member, which judgment was founded on a debt created in September, 1889. The defendants seem to have claimed the premises as their homestead, and Mrs. Turner claimed them as her own under a deed executed to her by her husband, which was dated December 10th, 1889, recited the payment of one dollar as its consideration, and was duly acknowledged and recorded. The defendants offered this deed in evidence, but the court excluded it, on objection by the plaintiff; and defendants excepted. The defendants then offered to prove that L. W. Turner owned the property, and with his family occupied and claimed it as his homestead, at the time of the levy of the execution, and for several years prior thereto; that he was a resident citizen of Alabama; that the value of the property was not more than \$2,000. The court excluded each part of this evidence, on objection by plaintiff, and defendants excepted. The court charged the jury, on request, to find for the plaintiff if they believed the evidence; and to

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this charge the defendants excepted. The rulings on evidence, and the charge of the court, are here assigned as error.

B. B. BOONE, for appellants.—(1.) Under the statutory provisions which have been of force since February 28th, 1887, (Code, §§ 2341-51,) the husband may convey property directly to the wife, and thereby invest her with a legal title to the property conveyed.—*Maxwell v. Grace*, 85 Ala. 577; *Manning v. Pippen*, 86 Ala. 337; *Schlapback v. Long*, 90 Ala. 525. (2.) The conveyance by L. W. Turner to his wife, though effective to pass the legal title to the land, was not an alienation of the homestead, which requires the joint deed of husband and wife (Code, § 2508), and did not destroy the qualities of the property as a homestead. It remained, as before, the family homestead.—Thompson on Homesteads and Exemptions, § 473; Platt on Rights of Married Women, 225, § 70; *Harsh v. Griffin*, 72 Iowa, 608; *Burkett v. Burkett*, 78 Cal. 310, and 12 Amer. St. Rep. 58; *Baines v. Baker*, 60 Texas, 140; *Riehl v. Bingenheimer*, 28 Wisc. 24. (3.) If the property was the debtor's homestead, his conveyance of it to his wife, though voluntary, was not a fraud on his creditors, since they could not be injured by it.—*Fellows v. Lewis*, 65 Ala. 343; *Wright v. Smith*, 66 Ala. 514; *Lehman v. Bryan*, 67 Ala. 558; *Alley v. Daniel*, 75 Ala. 406; *Carhart v. Harshaw*, 30 Amer. Rep. 756; *Pike v. Miles*, 23 Wisc. 164; *Gassett v. Grout*, 4 Metc. 490; *Derby v. Wegruch*, 30 Amer. Rep. 827; *Danforth v. Beattie*, 43 Vt. 138; *Wood v. Chambers*, 29 Texas, 254; *Drentzer v. Bell*, 11 Wisc. 114; 3 Washb. Real Property, 334; Wait's Fraud. Conveyances, § 46. (4.) If the defendant in execution had no title to the property at the time of the levy and sale under execution, the plaintiff acquired nothing by his purchase. *Richardson v. Carrington*, 79 Ala. 101.

PILLANS, TORREY & HANAW, *contra*.—If the property was the homestead of the debtor at the time of the levy, he could have interposed his claim of exemption, which would have given the plaintiff an opportunity to contest the questions of occupancy, value, &c. Instead of doing this, he makes an attempted conveyance to his wife, which is a nullity as an alienation of the homestead, because the wife did not join in it; and it would have been equally invalid if she had joined, because a party can not be both grantor and grantee in a deed.—Code, § 2508; *Cox v. Holcomb*, 87 Ala. 589; *Richardson v. Woodstock Iron Co.*, 90 Ala. 266; Vol. 95.

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Trawick v. Davis, 85 Ala. 342; *Falk v. Hecht*, 75 Ala. 293. The question of homestead being eliminated, because no claim of exemption was interposed, and the deed by the debtor to his wife being void, because voluntary, the property was left subject to the plaintiff's execution, and he was entitled to the general charge on the evidence.

MCCLELLAN, J.—The fate of this appeal depends entirely upon whether the husband can convey lands which constitute the family homestead to the wife, the deed to that end being executed by himself alone, but delivered to and accepted by her.

Both the organic and the statute law of Alabama declare, that no alienation of the homestead shall be valid without the voluntary signature and assent of the wife to the instrument intended to have that effect. The "Married Woman's Law" of 1887 removed the legal disabilities theretofore existing between husband and wife to the extent, among others, of enabling the husband generally to sell and convey lands to the wife; but it has never been supposed, and is not, we apprehend, the law, that the statute changed in any way pre-existing requirements in respect of the alienation of the homestead further than this, that if before its passage the husband might have conveyed an equitable title in the homestead to the wife, he may now convey the legal title. So that the question is not really at all affected by the act of 1887; and it comes back to this: Is such a conveyance an *alienation* of the homestead within the meaning of section 2, Art. X of the Constitution, and section 2508 of the Code? If it is, it can not be effective now any more than before the passage of the act of 1887; if it is not, it would have been as effectual in equity before that act, as it would be now at law. And if the husband may convey land constituting the homestead to the wife, his deed for that purpose can not be joined in by the wife—that is, her joinder therein would add nothing to its effect, since she can not be both grantor and grantee in the same instrument.—*Trawick v. Davis*, 85 Ala. 342.

It is manifest, of course, that the requirement of the wife's voluntary signature and assent to any alienation of the homestead is for the protection of the wife, to secure to her a home of which she can not be deprived except through her own free act. As is said by Judge Thompson: "The policy of those statutes which restrain the alienation of the homestead without the wife joining in the deed is to protect the wife, and to enable her to protect the family, in the

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possession and enjoyment of a homestead, after one has been acquired by the husband." It is not perceived how this policy of the law could be in any degree thwarted by upholding the husband's conveyance of the homestead *land* to the wife. It is still her homestead, and still incapable of passing from her and the family without her voluntary signature and assent to the instrument operating the alienation. She and the family are as fully protected before as after such conveyance, and no violence is done to any purpose of the law respecting her and her children, by according validity and giving force to such a conveyance. Not only so, but the premises are still as much the homestead of the husband—he has the same right of occupancy and enjoyment—as before the execution of the conveyance; and this right can not be taken away from him—the wife can not convey the land—without his voluntary assent and signature. And this is true whether he be regarded as still having a special property in the land, by reason of its homestead character, or whether it be considered that the land belongs absolutely to the wife; since, even in the latter case, there could be no alienation of it by her without his assent and concurrence, he being *sui juris* and a resident of the State, manifested by his joining in the alienation in the mode prescribed by law for the execution of conveyances of land.—Code, § 2348. It would seem then in all reason that a conveyance of homestead premises by the husband to the wife, while having effect as an alienation of the *land* in the sense of passing the legal title to her, is yet not an alienation of the *homestead*, since that does not thereby pass either from the husband, the wife or the family, but is still in every essential quality and attribute with respect to possession, enjoyment and all the rights necessary to its protection as exempted property, the homestead alike of the husband, the wife and their children. And so it is said further by the eminent author quoted above, that laws requiring the voluntary assent and signature of the wife to an alienation of the homestead, "are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever may be the form of such conveyance."—Thompson on Homestead, &c., § 473. And the adjudged cases fully support not only this text, but the conclusion we have arrived at, that such a conveyance is not an alienation of the homestead within the meaning of the Constitution and statutes of Alabama, but is valid for the purpose of passing

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the legal title of the land into the wife, subject to all pre-existing homestead rights, without the voluntary signature and assent of the wife.—*Harsh v. Griffin*, 72 Iowa, 608; *Burkett v. Burkett*, 78 Cal. 310; s. c., 12 Am. St. Rep. 58; *Reihl v. Bingenheimer*, 28 Wis. 24; *Bains v. Baker*, 60 Tex. 140; *Rouhs v. Hooke*, 3 Lea, 302; s. c., 31 Am. Rep. 642; *Spoon v. VanFossen*, 53 Iowa, 494.

The rulings of the trial court to which exceptions were reserved, were made, are attempted to be sustained here, and could be sustained, only on the theory of the invalidity of Turner's deed to his wife. That theory being untenable, each of those rulings, it follows, was erroneous.

The judgment of the Circuit Court is therefore reversed, and the cause remanded.

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Bill in Equity by Judgment Creditor, to reach and subject Property held by Wife of Deceased Debtor.

1. *Waiver of exemptions in note; insurance by debtor for benefit of his wife.*—A waiver of exemptions in a promissory note does not affect the debtor's right to insure his life for the benefit of his wife, paying annual premiums not in excess of \$500 (Code, § 2356); nor can the creditor, having reduced his debt to judgment, reach and subject in equity property which the surviving wife has bought or improved with the proceeds of the policy.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. WM. H. TAYLOR.

The bill in this case was filed on the 14th November, 1890, by John Craft, doing business under the name of Craft & Co., against Mrs. Julia J. Stoutz, both individually and as executrix of the will of her deceased husband, F. Arnold Stoutz, and contained these allegations: (1.) That said F. A. Stoutz was indebted to complainant, January 1st, 1883, for goods sold and delivered, and the indebtedness continued to increase until August 19th, 1885, when he executed to complainant his several promissory notes for the amount due, each containing a waiver of exemptions; and on these notes complainant recovered a judgment against him, Dec. 16th, 1887, on which an execution was afterwards issued, and returned "No property found." (2.) That said Stoutz, "during the existence of said indebtedness, and before the

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execution of said notes," had taken out a policy of insurance on his own life in the sum of \$4,000, for the benefit of his wife, and he continued to pay the quarterly installments, about \$30, until his death, which occurred on the 3d May, 1890; and the bill charged that these payments were in the nature of a voluntary conveyance, and were fraudulent as against complainant's rights as a creditor. (3.) That on the 26th February, 1883, said Stoutz executed to his wife a deed conveying the house and lot in which they resided as a homestead, and which was of value more than \$2,000; and the bill charged that this conveyance was voluntary, though it also recited the payment of a nominal consideration, "and was and is null and void, because not executed as by law prescribed for the conveyance of the homestead." (4.) That on the 1st April, 1884, Stoutz and wife executed a mortgage on the property, still occupied as their homestead, to Phoebe A. Tuthill, to secure a debt of \$1,000, money borrowed by said F. A. Stoutz; and this mortgage being foreclosed, M. G. Hudson became the purchaser, at the price of \$1,060, and received a conveyance from the mortgagee, dated March 23d, 1886; but, on the 26th June, 1886, he re-conveyed the property to her, on the recited consideration of \$1,060 paid. (5.) That on the 28th June, 1886, F. A. Stoutz borrowed \$1,200 from one F. L. Gelbke, and paid \$1,100 of the money to Phoebe A. Tuthill in satisfaction of her claim; who thereafter conveyed the property by deed, reciting that consideration, to the wife of said Stoutz; and on the next day, June 29th, Stoutz and wife conveyed the property by mortgage to Gelbke to secure the payment of the \$1,200 so borrowed. (6.) That Mrs. Stoutz collected the insurance money soon after the death of her husband, paid off the mortgage to Gelbke, satisfaction of which was entered on the record, expended \$2,000 or more in the erection of improvements on the property, reported the estate of her husband insolvent, and had it so declared, and refused to pay complainant's judgment; and the bill alleged that in fact there were no assets of the estate out of which satisfaction of the judgment could be enforced.

On these allegations, the bill prayed (1) that the conveyance by said Stoutz to his wife be declared null and void, and be cancelled; (2) that the payments made by him in premiums on the policy of insurance, after the execution of notes to the complainants, be declared fraudulent as against complainant's rights as a creditor, and chargeable on the insurance money received by the defendant, and on the property in which she had invested the same; and (3) that

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the conveyance from Mrs. Tuthill to the defendant be declared fraudulent, and the property condemned to the satisfaction of the complainant's debt.

The defendant demurred to the bill for want of equity, (1) because it showed that the policy of insurance was taken out before the execution of the notes by said Stoutz to the complainant, and (2) because it showed that the annual premiums paid were less than \$500, and (3) because it showed that defendant did not join in the execution of said notes; and also for multifariousness, because it sought to have complainant's debt declared a charge on the property, and also to have the conveyances of the property declared fraudulent and void.

The chancellor sustained the demurrer generally, not specifying any ground, but gave the complainant leave to amend his bill; and an amendment was then filed, which is thus set out in the record: "(1.) By striking out, on page 9 of the bill, the last two lines, beginning with the word *then* immediately after the word *Honor*; also, by striking out the first line on page 10, ending with the word *came*. (2.) Also, by striking out the first eleven lines of the prayer on page 10, and beginning on the 10th page with the words *the deed of conveyance*, &c. (3.) Also, by adding after the word *debt*, in the 19th line of page 10, the following: 'That payment of \$1100 by said F. A. Stoutz to Phoebe Tuthill, and the investment of the purchase of said property, wherein the title to said property is taken in the name of defendant; and that your Honor will then charge said property with the payment of said sum due to complainant from said Arnold Stoutz; and that said property be condemned and subjected to the satisfaction of complainant's said debt; and that said deed from said Phoebe Tuthill to defendant be set aside, cancelled and annulled;'" and the general prayer for other and further relief was then added.

The defendant demurred to the amended bill, on the same grounds as to the original; and the chancellor sustained the demurrer. The decrees on the demurrers are assigned as error.

WM. E. RICHARDSON, for appellant.

F. G. BROMBERG, *contra*.

COLEMAN, J.—Craft & Co., complainants, as creditors of the estate of F. Arnold Stoutz, filed the present bill to subject to the payment of their claim certain property, the

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legal title to which is in the name of his wife, the respondent.

It is unnecessary to consider the validity of the deed of 1883, by which Arnold Stoutz, the husband, conveyed the homestead to his wife. If null and void for want of consideration, or defective execution of the conveyance, or for any other cause, the mortgage on this property executed by Stoutz and wife to Phœbe A. Tuthill, on the 1st day of April, 1884, is not assailed. At the time of the execution of this mortgage, complainants had no lien on, or claim to this property, and the grantors had a perfect right to mortgage the same, if they saw proper. This mortgage was foreclosed on the 23d day of March, 1886, and at the sale the property was purchased by one Hudson, either for himself or the mortgagee. If this property, conveyed by the mortgage to Tuthill, was the property of Arnold Stoutz, as charged in the bill, complainants, as judgment-creditors of Arnold Stoutz, were authorized to redeem this property from the purchaser. Their judgment against Arnold Stoutz was recovered on the 16th day of December, 1886, and they have permitted more than two years to elapse, the time allowed by statute for redemption. The present bill is not one to redeem the property.

It is averred that, on the 28th day of June, 1888, Phœbe Tuthill by deed conveyed the property to Julia Stoutz, for an expressed consideration of eleven hundred dollars; that on the 28th day of June, 1888, twelve hundred dollars was borrowed by Arnold Stoutz from one Gelbke, the payment of which was secured by a mortgage executed by Julia Stoutz (the wife) and her husband on this property to said Gelbke, and that the money thus borrowed was the money paid to Mrs. Tuthill, the consideration for the conveyance to Mrs. Julia Stoutz of June 28th, 1888. The bill then shows that the husband, Arnold Stoutz, died, and out of the proceeds of a policy of insurance taken out by him in his life-time for the benefit of his wife, Julia Stoutz, the mortgage to Gelbke was paid by her; and that the wife, in addition to the money paid to satisfy this mortgage, expended about two thousand dollars in improving the premises. The bill charges that complainant's judgment was founded upon notes made by Arnold Stoutz, in which he waived his right to claim exemption of personal property, and that these notes antedated the payment of the annual premiums, and that the premiums paid upon the policy were voluntary, and null and void for this reason as against him. The equity of complainant's bill, and his right to relief in this aspect of

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the case, depend upon the right of the wife to the money collected from the policy.

Section 2356 of the Code provides, that the wife may insure the life of the husband, for the benefit of herself, or for the benefit of herself and child or children of the marriage. It also provides that the husband or father may insure his life for the benefit of the wife and child or minor children, and such insurance is exempt from liability for his debts or engagements, if the annual premiums do not exceed five hundred dollars. In this case, as appears from the bill, the annual premiums were not so much as five hundred dollars.

A note waiving exemption as to personal property is a mere debt or engagement. It in no sense creates a lien on property or money. The effect of the statute which permits the husband to insure his life for the benefit of his wife is to enable the husband to expend so much money in the manner prescribed, for the benefit of his wife, which, without the statute, would not be exempt from liability for the debts of the husband. The creditors of Arnold Stoutz, the husband, have no claim upon the insurance money, the proceeds of the policy taken out for the benefit of the wife. This money belongs to her in her absolute right, and she had the power to expend it as she saw proper.

The demurrer to the bill raised these questions, and was properly sustained.

Affirmed.

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Attachment.

1. *Security for costs; waiver.*—A motion to require plaintiff to give security for costs, because a non-resident (Code, § 2858), will be presumed on appeal to have been waived or abandoned, when the record does not show that it was acted on, or even that it was called to the attention of the court.

2. *Notice of levy of attachment; waiver.*—In an action commenced by attachment, the case does not stand for trial at the first term, unless the attachment is levied and notice thereof given twenty days before the commencement of the term (Code, § 2995); but the failure to give the notice is not good cause for dismissing the attachment at that term, and is waived by a general appearance, filing pleas, and going to trial.

3. *Description of plaintiff as partnership or corporation; amendment of affidavit.*—In an action commenced by attachment in the name of

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"*H. B. Claflin Company*," without other descriptive words, an amended affidavit may be filed (Code, § 2998), alleging that the plaintiff is a corporation.

4. *Plea of nul tiel corporation*.—Under statutory provisions (Sess. Acts 1888-9, p. 57), a plea denying plaintiff's corporate existence must be verified by affidavit.

5. *Specification of grounds of demurrer*.—When the judgment-entry recites that a demurrer was sustained to a special plea, but the record does not show what grounds of demurrer, if any, were specified, this court can not review the ruling.

6. *Plea denying each and every allegation of complaint*.—In an action by a corporation, the complaint containing the common counts only, a plea denying "each and every allegation of the complaint" amounts only to the general issue.

7. *Error without injury in ruling on pleas*.—Sustaining a demurrer to a plea, if erroneous, is error without injury, when the defendant had the benefit of the same defense under another plea, on which issue was joined.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. JOHN MOORE.

The record shows these facts: On the 20th January, 1891, an attachment was sued out in the name of "*H. B. Claflin Company*," without other words of description, against *F. S. & H. Rosenberg*; and was levied by the sheriff on the defendants' stock of goods. The sheriff's return on the attachment stated that he gave personal notice of the levy to the defendants on the 22d March, and the same date is copied in the return to a *certiorari*. During the trial term, March 18th, leave was granted to the sheriff to "amend his return on the notice to the defendants of the levy of the attachment," but the record does not show what amendment, if any, was made. On the same day, leave was granted to the plaintiff to file an amended affidavit; and an amended affidavit was accordingly filed, which alleged that plaintiff was a body corporate. A complaint was filed February 23d, 1891, in which the plaintiff was described as a body corporate, and which contained only the common counts. On the 19th March, the defendants entered a motion "to dissolve and dismiss the attachment, and to quash and dismiss the levy," specifying eleven grounds, which were, in substance, (1) because of a variance between the original and the amended affidavits; (2) because the amended affidavit does not state whether the plaintiff is a domestic or a foreign corporation; (3) because the amended affidavit made an entire change of parties; (4) because a sufficient attachment bond was not given; (5) because no notice of the levy of the attachment was given to the defendants. On March 21st, defendants entered a motion to require plaintiff (1) to give a new bond, and (2) to give security for the costs. On the Vol. 95.

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same day, as shown by the judgment-entry, the court overruled the motion to dismiss, and required plaintiff to give a new bond; but the record does not show any action on the motion to require security for the costs. The defendants then filed eleven pleas, numbered consecutively from 1 to 9, and then 12 and 13. The 1st plea alleged that the plaintiff "is not a corporation duly authorized by law to maintain this suit;" the 2d and 3d each, in substance, that plaintiff was a foreign corporation, and had not complied with the constitutional and statutory provisions restricting the right of such corporations to do business in Alabama; the 4th set up the variance in the description of the plaintiff in the two affidavits; the 5th, that the attachment was not sued out by said corporation, nor by any agent or attorney in its behalf; the 6th, that the complaint shows an entire change of parties plaintiff; the 7th, that the action was commenced without a party plaintiff; the 8th, that the complaint and amended affidavit "show a new and different action from the one originally commenced;" the 9th, the same in substance as the 8th; the 12th, the general issue; and the 13th, a denial of "each and every allegation of the complaint." The judgment-entry recites that the plaintiffs demurred to the 13th plea, and that the court sustained the demurrer; but the demurrer is not set out, nor the grounds of demurrer, if any were specified. It is recited, also, that the court struck from the files, on motion, "pleas numbered 1, 4, 5, 6, 7, 8, and 9," and that issue was joined on the remaining pleas, Nos. 2, 3, and 12.

The defendants appeal, and make numerous assignments of error, founded on the rulings above stated. There is no bill of exceptions in the record.

GASTON A. ROBBINS, for appellants.

DAWSON & PITTS, *contra*.

WALKER, J.—1. The record fails to show that any action was taken by the Circuit Court on the motion of the defendants to require the plaintiff to give security for the costs. As it does not appear that the motion was insisted on, or even called to the attention of the court, the presumption on appeal is that it was abandoned or waived. *Hutcheson v. Powell*, 92 Ala. 619; *Covington County v. Kinney*, 45 Ala. 176; *Dougherty v. Colquitt*, 2 Ala. 337.

2. A suit commenced by attachment is triable at the return term of the writ, if the levy has been made and notice

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thereof given twenty days before the commencement of such term.—Code, § 2995. If the notice of the levy has not then been given, and the defendant does not appear, the case can not be tried at that term; but it may be continued, and notice of the levy may be given thereafter. No reason is perceived why the mere failure of the officer to serve the notice at the proper time should confer on the defendant the right to have the attachment dismissed. However that may be, it is plain that nothing remains to be accomplished by a service of the notice, if the defendant voluntarily appears and pleads to the complaint. The purpose of the notice is to afford the defendant the opportunity to appear and make defense. A general appearance dispenses with the necessity of a formal notice, and is a waiver of any previous irregularity in the service of process.—*Lampley v. Beavers*, 25 Ala. 534; *Moore v. Easley*, 18 Ala. 619; *Peebles v. Weir*, 60 Ala. 413. The appearance of the defendants in this case was not limited to the purpose of the motion to quash the levy and to dissolve and dismiss the attachment. They recognized the case as in court by filing a number of pleas, several of which involved a recognition of the service of the writ of attachment, and by going to trial, without objection, so far as the record discloses. All objections because of the failure of the officer to serve written notice of the levy were waived by this general appearance. If the defendant in attachment appears and pleads, the cause proceeds as in suits commenced by summons and complaint.—Code, § 2996. In claiming that the motion to quash the levy and to dissolve and dismiss the attachment should have been granted because of the failure to serve written notice of the levy, the appellants urge an objection which has been removed by themselves.

3. The original affidavit for the attachment correctly stated the name of the plaintiff, but did not describe it either as a partnership or as a corporation. The plaintiff was permitted to file an amended affidavit, in which its corporate character is duly stated. It has been held that the absence of an allegation of the plaintiff's corporate capacity, in an original complaint filed by a corporation, could not be regarded as a failure to name any plaintiff at all, and that an amendment of the complaint by stating the plaintiff's corporate character should be allowed.—*Southern Life Ins. Co. v. Roberts*, 60 Ala. 431; *Alabama Conference v. Price*, 42 Ala. 47. Such an amendment is a mere correction of the description of a plaintiff, already named; it does not amount to a departure from the original complaint, to the institu-

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tion of a new action, or to the introduction of a different party plaintiff. A similar amendment of the affidavit in an attachment case is plainly authorized by the provision of the statute that the plaintiff, before or during the trial, must be permitted to amend any defect of form or substance in the affidavit; and no attachment must be dismissed for any defect in the affidavit, if the plaintiff, his agent, or attorney, will make a sufficient affidavit.—Code, § 2998. The mandate of the statute, that the attachment law must be liberally construed to advance its manifest intent, need not be invoked to justify this conclusion. The sufficiency of the defendants' pleas numbered 4, 5, 6, 7, 8 and 9 depended upon the correctness of the assumption that the suit was not commenced by the plaintiff corporation, because its corporate capacity was not stated in the original affidavit. That assumption was erroneous, and there was no error in striking the above mentioned pleas from the files. None of them presented a valid defense to the suit.

4. The first plea was a denial that the plaintiff is a corporation authorized to maintain this suit. This plea was insufficient, because it was not sworn to. It presented an issue as to the existence of the plaintiff as a corporation. The plaintiff can not be required to prove its corporate existence, unless the same is denied by a plea verified by affidavit.—Acts of Ala. 1888-9, p. 57.

5-7. No demurrer to the thirteenth plea is found in the record. As there is nothing to show what were the grounds of the demurrer, we are unable to review the ruling of the court in sustaining it. However erroneous that ruling may have been, it involved no injury to the appellants. The plea amounted only to the general issue.—*Louisville & Nashville R. R. Co. v. Trammell*, 93 Ala. 350. The twelfth plea amounted to the same thing. Under this plea, the defendant had the full benefit of all matter of defense that would have been available to it under the thirteenth plea. Sustaining the demurrer to the latter plea was, for this reason, error without injury, if error at all.—*Manning v. Maroney*, 87 Ala. 563.

We have discovered no error in the record, and the judgment of the Circuit Court must be affirmed.

Espalla v. Gottschalk.

Forcible Entry and Detainer.

1. *When administrator may maintain action.*—An administrator, whose right and title relate back to the intestate's death, may maintain an action of forcible entry and detainer, or unlawful detainer (Code, §§ 3380-81, against a person who, with his wife, was living on the premises with the intestate at the time of his death, "as his friends, by his invitation and request, and without any claim or right of possession," and who, being left in possession by the administrator under appointment as special administrator only, "on the understanding and their agreement to hold the same as his tenants until further orders," afterwards attorned to another person as landlord; and he may also maintain the action against such third person, and against any tenant placed by him in possession after the removal of the attorning tenant.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by Joseph Espalla, as administrator of the estate of Silas Holloway, deceased, against William Gottschalk and his tenant in possession, Henry Rogers; and was commenced in a justice's court, on the 2d December, 1890. The complaint contained three counts, each of which alleged that the plaintiff, as administrator, was in the peaceable possession of the premises on the 13th March, 1889; the first count further alleging that "the defendants peaceably entered on the premises while so in his possession, and then turned plaintiff out of possession by unlawfully refusing to deliver up possession of the same to him, on his demand in writing made on the 29th November, 1890;" the second count, that the defendants, "by force and strong hand, &c., entered upon said premises, and expelled plaintiff's tenant, and detain the same by force;" and the third count, that the defendants "lawfully entered into the possession of said premises, and, after the termination of their possessory interest, refused to deliver possession thereof to plaintiff on his demand in writing." The defendants pleaded not guilty, and adverse possession for three years before suit brought; and issue was joined on these pleas. On the trial in the Circuit Court, to which the case was removed by appeal, the court charged the jury, on request, to find for the defendants if they believed the

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evidence; and this charge, to which the plaintiff excepted, is now assigned as error.

R. INGE SMITH, for appellant.

R. P. DESHON, *contra*.

STONE, C. J.—This was an action of forcible and unlawful detainer, the complaint being framed in varying counts to suit possible varying phases of the proof. The subject of the suit was a lot of ground and a tenement thereon. After the trial before a justice of the peace, an appeal was prosecuted to the Circuit Court, and verdict and judgment were there rendered for the defendant.

There does not appear to have been any conflict in the testimony proving the following state of facts: Silas Holloway, plaintiff's intestate, died February 14, 1889. At that time, and for many years prior thereto, he had been in the undisputed possession of the land sued for, resided upon it, and claimed it as his own. His claim of title and possession dated back to February, 1882. "For many years prior, and up to, and at the time of said Holloway's death, one Turner and his wife lived with him in the house on said premises, as his friends, and by Holloway's invitation and request, without any claim or right of possession as against said Holloway." On February 16, 1889—two days after Holloway's death, Joseph Espalla, jr., plaintiff in this suit, was appointed and qualified as special administrator of his estate. On March 13, 1889, the said Espalla received a general appointment as such administrator, and qualified as such.

On the day of the special appointment, or the next day, Espalla repaired to the late residence of his intestate, and took possession of his personal effects, Turner and his wife aiding him. He also asserted possession of the realty, "and left said Turner and wife in possession of the same as plaintiff's tenants, on the understanding and on their agreement to hold the same as his tenants until further orders."

There was testimony showing that, between the time of the issue of the special and general letters of administration, and without plaintiff's knowledge or consent, Gottschalk went on the premises, and arranged with Turner and wife, by written lease, that they would hold and occupy the premises as his tenants. He subsequently placed another tenant on the premises with Turner and wife; and they not agreeing, Turner and wife removed from the premises,

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leaving their co-tenant in possession. Subsequently, Gottschalk placed Rogers in possession as his tenant. He, Rogers, was in possession when this suit was brought, and he is made a defendant with Gottschalk.

There was testimony tending to show that Gottschalk's claim of title was as follows: The lands had been sold for taxes assessed against Holloway, Gottschalk became the purchaser, and he had received a tax-deed. There was also testimony tending to show that this purchase was made at the instance, and as the friend of Holloway; that Holloway had, all the while, claimed and occupied the land as his own, and had regularly given in, and paid the taxes upon it since the sale. The court gave the jury the general charge, to find for the defendants, if they believed the testimony.

Letters of administration conferring general authority can not be granted "until the expiration of fifteen days after the death of the intestate is known."—Code of 1886, § 2019. Special administration may be granted at any time after intestate's death.—*Ib.* § 2020. The powers of such special administrator are defined in the statute, and taking control of the real estate is not mentioned as one of them. The functions and powers of the special administrator cease when general administration is granted.—Code, §§ 2021–23. Special administration sometimes endures for a considerable time, and it may be that it is the duty of such special appointee to look after the real estate, and see that it is not subjected to spoliation or waste. This, under our statutory system, which commits the custody and control of the realty to the personal representative at his option, and makes it assets for the payment of debts. For reasons to be stated further on, we consider it unnecessary to decide this question.

The fact, if it be such, that Gottschalk had acquired a title to the property by purchase at tax-sale, could exert no influence whatever in the trial of this case. "The estate or merits of the title can not be inquired into."—Code of 1886, § 3389. Prior lawful possession, and its forceful disturbance, or unlawful, subsequent interference with it, are the fundamental issues of fact, on which the fate of such controversy must mainly depend.—*Welden v. Schlosser*, 74 Ala. 355; 3 Brick. Dig. 505, §§ 5, 8; 2 *Ib.* 9, § 35. Gottschalk and his tenant, Rogers, must be treated in this case as if they and each of them were without title.

Under our system, a personal representative may sue and recover real estate on the title of him of whose estate he is
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the legal representative. And prior actual possession, until overcome by opposing proof, will maintain an action to regain the property, against any one subsequently found in possession.—3 Brick. Dig. 325, § 47. "The personal representative has the right and capacity to maintain all suits necessary to recover possession of the land."—*Ib.* 465, § 157.

It is settled by decisions of this court too numerous to be cited, that to maintain the statutory proceeding resorted to in this case, the plaintiff must have had the actual possession, and the defendant must have unlawfully ousted him, or unlawfully held over, after the expiration of a temporary authority to occupy. Constructive possession is not enough. 3 Brick. Digest, 505, § 3. Does plaintiff's testimony make a case within this rule?

There is no question that when Holloway, plaintiff's intestate, died, he was, and for years had been, in possession of the premises sued for, claiming title. Turner was there by his permission, a tenant by sufferance, holding in the right of, and under Holloway. He was precluded by the very nature of his holding from setting up title adverse to Holloway; and if, while so holding, he had acquired a perfect title to the property from an outsider, he would have been estopped from setting it up, until he first surrendered back the possession to Holloway.—*Houston v. Farris*, 71 Ala. 570; *Norwood v. Kirby*, 70 Ala. 397. And he could not, by any act of his, clothe another with rights he could not himself have asserted. If, standing towards each other as the testimony shows Holloway and Turner did, Holloway had removed from the premises, leaving Turner in possession, and Turner had then attorned to Gottschalk, accepting a lease from him, Holloway could have maintained unlawful detainer against Turner or Gottschalk, or against any one else who came in pursuant to and in virtue of the said attempted attornment from Turner to Gottschalk.

It is necessarily true that death puts an end to all property-ownership which had been in the decedent. A dead man can not own property. It does not, however, abrogate the title. That continues, and passes at once to those on whom the law devolves it. It can not be in abeyance. True, in cases of intestacy, there is for a time no known personal representative to assert the title; but when one is appointed, his claim and right relate back to the moment of intestate's death. To the extent the law gives him title, or authorized control over decedent's estate, personal or real, to that extent the law dates that title and control back to the time when the intestate breathed his last. Not the authority to

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sue, or otherwise assert the right, for that is conferred by his appointment. It is the right which relates back, not the remedy for its enforcement. And that right exists as the intestate left it by his death.—3 Brick. Dig., 463, § 130; *Ib.* 464, § 139; 1 *Ib.* 932, § 262. Our statutes confer on the personal representative the authority to take possession of the realty, and to sue and recover it for the purposes of administration; and when he asserts the right, it intercepts the descent, and dominates the right of the heir at law to enter.—1 Brick. Dig., 937, §§ 331-2; 3 *Ib.* 645, § 152. The sum of our decisions is, that “the personal representative has the right and capacity to maintain all suits necessary to recover possession from the heirs or alienee of the heirs.” 3 Brick. Dig. 465, § 157.

The doctrine of revivor applies to this form of action. *Ridgeway v. Waugh*, 51 Ala. 423.

To apply these principles to this case: When Espalla was appointed administrator, he succeeded at once to all the rights and remedies of his intestate, if he elected to assert them, and that right related back to the moment of Holloway's death. If the plaintiff, Espalla, entered upon the land, and let it to Turner, he did so as the administrator of Holloway, and in virtue of the authority his appointment conferred upon him. If that entry and letting were authorized by his appointment as special administrator, then he could have sued in his individual name, and could have counted on his personal possession. But the law did not require him to do so. He had the equal right to sue in his representative capacity, for his right was but the intestate's right and possession, to which he had succeeded.—*Sims v. Boynton*, 32 Ala. 353; *Spear v. Lomax*, 42 Ala. 576; *Nicrossi v. Phillippi*, 91 Ala. 299.

It is clearly shown that, if before Holloway's death he had been forcibly evicted, or his tenant had held over, he could have maintained forcible or unlawful detainer, and his tenant could not, by his attornment to another, confer a possession that could defeat that action. We hold that Espalla, by his appointment as administrator, is not to be regarded as in by constructive possession. He was thereby clothed with the possessory right and remedy of his intestate. The Circuit Court erred in the charge given.

Reversed and remanded.

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Bill in Equity for Injunction of City Electric Lights Works as Nuisance.

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1. *Injunction for abatement of nuisance.*—An injunction for the abatement of a private nuisance is not a matter of absolute right, but rests in judicial discretion, to be exercised according to the settled principles which regulate the interference of the court in such cases, having regard, on the one hand, to the right of every person to use his own property as his taste, desires and interest may dictate, and, on the other, to the right of his neighbors to the comfortable and unmolested use and enjoyment of their property; and it should only be granted "when imperatively necessary to prevent multiplicity of suits, irreparable injury, or continuous or constantly recurring injuries, for which legal remedies are inadequate to afford full redress."

2. *Nuisance defined.*—While it is difficult, if not impracticable, to formulate a rule accurately defining the acts or facts which will constitute a nuisance under any and all circumstances, it may be stated as a general proposition, that any establishment erected on his premises by the owner, though for the purpose of trade or business lawful in itself, which, from the situation, the inherent qualities of the business, or the manner in which it is conducted, directly causes substantial injury to the property of another, or produces material annoyance and inconvenience to the occupants of adjacent dwellings, rendering them physically uncomfortable, is a nuisance; and this principle has been applied to smoke, offensive odors, noises and vibrations, caused by the operation of gas-works, electric-light works, various factories and other industries located in a city.

3. *Injunction against industrial enterprise of public utility in city.* When an injunction is sought against an industrial enterprise of public utility in a city, the abatement of which as a nuisance would entail heavy loss on the owners and injury to the citizens generally by increased cost of light, or otherwise, the court will exercise its power cautiously and sparingly, and will require the complainants to show a case of imperative necessity by clear and convincing evidence; and when the evidence shows, as in this case, that the noises, smoke, soot and vibrations caused by the operation of the defendant's machinery and works, which are complained of, have been greatly reduced by the introduction of improved machinery and appliances, and may be further lessened at small expense to the complainants, until brought within the ordinary discomforts and inconveniences incident to a city life, the court will refuse to interfere by injunction, and will leave the parties to seek compensation by an action at law for damages caused by increased risk of fire, danger of explosion, depreciated value of property, and increased rate of insurance.

APPEAL from the Chancery Court of Mobile.
Heard before the Hon. THOS. W. COLEMAN.

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The bill in this case was filed on the 22d February, 1888, by Mrs. Martha E. English and others, owners of certain real estate in the city of Mobile, against the Progress Electric Light & Motor Company, a private corporation engaged in the business of manufacturing and furnishing electric lights for the streets, public buildings, private residences, &c., in the city of Mobile; and sought an injunction to abate the defendant's works as a nuisance, causing the complainants' great inconvenience, discomfort and injury, as more fully stated in the opinion. On final hearing on pleadings and proof, the court below dismissed the bill; and its decree is here assigned as error.

GREG. L. & H. T. SMITH, for appellants.—(1.) A court of equity will enjoin a private nuisance, (1) whenever necessary to prevent a multiplicity of actions, or (2) where the grievance is constantly recurring, or (3) where irreparable injury will be done, or (4) where the thing complained of is a nuisance *per se*.—*Ross & Smith v. Martin & Flowers*, 75 Ala. 515; *Wood on Nuisances*, §§ 769-72; *St. James' Church v. Arrington*, 36 Ala. 546; *Ogletree v. McQuayys*, 67 Ala. 584; *Nininger v. Norwood*, 72 Ala. 281; *Farris & McCurdy v. Dudley*, 78 Ala. 129; *Ross v. Butler*, 19 N. J. Eq. 294; *Robinson v. Baugh*, 31 Mich. 290; *White v. Forbes*, Walk. Ch. 112; *Sprague v. Rhodes*, 4 R. I. 301; *Cleveland v. Citizen's Gas Co.*, 20 N. J. Eq. 201; *Rochester v. Curtis*, Clarke's Ch. (N. Y.) 336; *Corning v. Troy Iron & Nail Co.*, 40 N. Y. 191; *Railroad Co. v. Archer*, 6 Paige Ch. 83; *Dittman v. Repp*, 50 Md. 516, or 33 Amer. Rep. 325; *Penn. v. Bridge Co.*, 13 How. U. S. 557.

(2.) Whatever is so offensive to the senses as to render life uncomfortable, is a nuisance; and it is none the less so because some persons have become accustomed by long use to endure them without discomfort. If the prosecution of a business, lawful in itself, renders the enjoyment of their property by other persons materially uncomfortable, by smoke, cinders, noise, vibrations, offensive odors, &c., though not injurious to health, it is a nuisance, and subject to abatement as such.—*Brander v. Harlan Lighting Co.*, 62 N. Y. Sup. 245; *Cooley on Torts*, 2d ed. 712; *McKeon v. See*, 25 How. Pr. 238; *Wesson v. Washburn Man. Co.*, 15 Allen, Mass. 95; *Ross v. Butler*, 19 N. J. Eq. 296; *Dennis v. Erhardt*, 3 Grant's Ch. 390; *Robbins v. Baugh*, 31 Mich. 291; *Dittman v. Repp*, 33 Amer. Rep. 325; *Meigs v. Lister*, 23 N. J. Eq. 199; 1 High on Injunctions, 496; 38 Amer. Dec. 567; 89 Amer. Dec. 616; *Fish v. Dodge*, 47 Amer. Dec. 254.

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(2.) The existence of the nuisance being fully established, the court will require it to be abated; and it may both enjoin and award damages.—*Farris & McCurdy v. Dudley*, 78 Ala. 129; 20 N. J. Eq. 387; High on Injunctions, 792; Wood on Nuisances, § 786. If the defendant can abate the nuisance without injury to his works, he may be allowed to do so; but the court will retain the bill until the nuisance is abated. How this shall be effected, is a question which concerns the defendant alone.

(4.) The right of a citizen to live free from nuisances does not depend on the character or construction of his house, nor on the neighborhood in which it is situated; nor can any neighborhood be outlawed from the protection of the court against nuisances, by the existence of two manufacturing establishments in its precincts. The rule applies only when the neighborhood is wholly given up to such establishments, so that the addition of one more will not greatly increase the discomforts.

(5.) A man has no right to erect extensive works and make heavy expenditures of money for the exercise of a trade or business which is a nuisance to his neighbors, and then claim immunity from liability on the ground that his business is of public utility, that he has adopted the most improved methods and appliances to lessen the discomforts caused to them, and that the stoppage of his works will involve him in ruin.

(6.) While the public have an interest in obtaining electric lights, they have no interest in the particular location of the works in any part of the city.

(7.) The evidence does not show any laches or acquiescence on the part of the complainants, such as would bar their right to relief—31 Mich. 293; *Stein v. Burden*, 29 Ala. 127; *Lewis v. Stein*, 16 Ala. 219; *Mills v. Hall*, 9 Wend. 315; *People v. Cunningham*, 1 Den. 524; *Staple v. Spring*, 10 Mass. 79; *Miller v. Frazer*, 3 Watts, 456; *Hodges v. Hodges*, 5 Metc. 205; 3 Camp. 398; 3 N. H. 88; 3 Denio, 306; 9 Wend. 315; 4 Wait's A. & D. 782.

J. LITTLE SMITH, THOS. H. SMITH, and OVERALL & BESTOR, *contra*.—The bill invokes the extraordinary power of the court to control an individual in the use and enjoyment of his own property; a power necessarily vested in a court of equity, but exercised cautiously and sparingly, and only in cases of imperative necessity to prevent irreparable injury and a multiplicity of suits, in which legal remedies are inadequate. When the thing sought to be abated is not a nui-

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sance *per se*, but is an industrial enterprise of public utility and convenience, the court will require a very strong case of necessity and damage to be shown; and if it appears that the discomforts or evils complained of can be abated by the introduction of improved machinery and appliances, or reduced within reasonable limits by a small expenditure of money or labor, will only require this to be done; and in all such cases, the court will consider the public interests involved, and damage to the defendant by the suppression of his works, as compared with the slight discomfort and inconvenience suffered by the complainants from their continued operation. These several principles apply to the facts of this case, and they are abundantly supported by the adjudged cases.—*Rouse & Smith v. Martin & Flowers*, 75 Ala. 515; *Rosser v. Randolph*, 7 Porter, 245; *Railway Co. v. Witherow*, 82 Ala. 196; *Ray v. Lyons*, 10 Ala. 63; *Huckenstein's Appeal*, 70 Penn. St. 106; *Richard's Appeal*, 57 Penn. St. 113; *Kingsbury v. Flowers*, 65 Ala. 484; *Green v. Lake*, 54 Miss. 540, or 28 Amer. Rep. 378; *Perry v. Railroad Co.*, 55 Ala. 420; *Dorsey v. Allen*, 85 N. C. 358, or 39 Amer. Rep. 704; *Gilbert v. Showerman*, 23 Mich. 49. Discarding the allegations of danger from fire, explosions, soot, increased rates of insurance, and depreciation in value of property, for which adequate compensation may be obtained by an action at law, the evidence shows no injury, present or prospective, beyond the ordinary discomforts and inconveniences incident to a city life, which constitute no ground for equitable interference by injunction.—*Carpenter v. Cummings*, 2 Phil. Eng. Ch. 76; *Anon.*, 3 Atk. 750; *Hyatt v. Meyers*, 73 N. C. 232; 38 How. Pr. 184. It is insisted, also, that if complainants ever had any case authorizing equitable relief, they have lost it by their own laches.—*Thomas v. Woodman*, 33 Amer. Rep. 156, and cases cited in opinion.

CLOPTON, J.—Appellants invoke the interference of the Chancery Court to abate by injunction, as a nuisance, the electric plant maintained and operated by appellee in the city of Mobile. The remedy sought is preventive, and incidentally compensatory. An injunction for such purpose is not a matter of absolute right; but, if, as has been said, it rests in judicial discretion, the exercise of such discretion is not without limitations, and is to be guided by the settled principles on which the interference by the court in such cases depends. In considering whether or not an injunction should be granted, regard must be had, on the one hand, to the right of every person to use his own property as his

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taste, desires and interest may dictate; and on the other, to the right of his neighbors to the comfortable and unmolested use and enjoyment of their property. No one should be restrained as to the use of his property, unless such use offends the legal rights of another. There are, certainly, instances of private nuisances, for which an action on the case can be maintained, yet insufficient to justify interference by injunction. This extraordinary and transcendent power should be exercised only when imperatively necessary to prevent multiplicity of suits, or irreparable injury, or continuous or constantly recurring grievances—when, from their irreparable nature, continuance, or frequent repetitions, the legal remedies are inadequate to afford full redress. While it is not essential that the injury should be strictly continuous, it must not be only occasional, or accidental.—*Rouse v. Martin*, 75 Ala. 570; 16 Amer. & Eng. Encyc. of Law, 959.

The plant of defendant was first established in April, 1885, and was operated and used by Cawthorn and his associates, for the purpose of lighting the dwellings and stores in the city of Mobile, until April, 1887, when they sold it to defendant, who has continued its operation, lighting the streets as well as dwellings and stores. The house in which complainant resided is a one-story frame house, having four rooms, with kitchen and servant's rooms, and is situated on a mound about twelve feet above the level of the street and the adjacent property. Many years ago, the streets in that portion of the city were graded to the level of the wharves, and the adjacent property, except complainants', cut down to the level of the streets. Brick walls were built on the four sides of complainants' lot, for the purpose of supporting the embankments.

The bill avers that defendant has a contract with the city of Mobile, under which it lights the streets of the city with electricity every night when the moon is not shining, and for this purpose uses four large boilers and several large dynamos; the ends of the boilers projecting to within a few feet of the wall of complainants. It further avers that, when the plant is in operation, a dense smoke is produced, the soot from which, in certain conditions of the atmosphere, is frequently blown up and into complainants' houses, and fills them, unless the windows are closed. Further, that the machinery, when in operation, frequently and at intervals makes a loud palpitating noise like the puffing of a locomotive when pulling a heavy train up-grade, which noise is sufficiently loud to be heard two hundred yards away; also, frequently creates a severe vibratory motion

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which shakes the surrounding buildings, and especially the buildings owned by complainants. The bill further avers, that the noise, vibrations and smoke are all made in the night-time, and frequently continue from early in the evening until nearly morning; that the noise disturbs the sleep of the occupants of the buildings, and the vibrations are so severe as to make the table-ware upon the tea-table and the windows of the house rattle, the chairs and furniture in the house rock, and to shake the occupants when in bed; that such noise and vibrations not only interfere with the sleep of the occupants, but render them nervous, and make the houses undesirable as places of residence, even for those in health, and in case of sickness would so excite an invalid as to seriously affect speedy recovery, and in certain cases be seriously dangerous to life. The bill further avers, that on several occasions portions of the machinery have burst, or blown out, making a loud noise greatly frightening complainants, causing them to run out into the street; that there is constantly thrown from said machinery steam in large quantities, and hot water which runs down the gutters in front of and around the residence of complainants, to their annoyance; that the proximity of of said boilers and machinery greatly increases the risk from fire, and rate of insurance, also adding great danger from the explosion of the boilers and breaking of machinery.

The answer denies these allegations of the bill, and sets up the great utility of the business to the public; also, that if there were causes of complaint at the commencement of the business, they have been obviated by the application of scientific appliances, and that any inconvenience experienced by complainants could have been prevented with little effort; also, that the acquiescence and fault of complainants induced defendant to invest a large sum of money in improving the plant.

It is difficult, if not impracticable, to formulate a rule accurately defining the acts or facts which will constitute a nuisance under any and all circumstances. We shall not make the attempt. As a general proposition, it may be said, that any establishment erected on the premises of the owner, though for the purposes of trade or business lawful in itself, which, from the situation, the inherent qualities of the business, or the manner in which it is conducted, directly causes substantial injury to the property of another, or produces material annoyance and inconvenience to the occupants of adjacent dwellings, rendering them physically uncomfortable, is a nuisance. In apply-

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ing this principle, it has been repeatedly held, that smoke, offensive odors, noise or vibrations, when of such degree or extent as to materially interfere with the ordinary comfort of human existence, will constitute a nuisance.—*Rouse v. Martin, supra*. This principle has been applied to various kinds of factories and industries located in a city, including gas-works, and the production of light by the operation of a steam-engine and dynamos.—*Cleveland v. Citizen's Gas Co.*, 20 N. J. Eq. 201; *Tocum v. Hotel St. George Co.*, 18 Abbott's New Cases, 340. The averments of the bill clearly make a case of nuisance, calling for its abatement by the Chancery Court; but the denials of the answer, and the affirmative and substantial defenses set up therein, make the necessity of interference turn upon the sufficiency of the evidence, proper legal principles being applied, to show that the electric plant, as now operated and conducted, so materially interferes with complainants' use and enjoyment of their adjacent dwellings as to entitle them to injunctive relief.

From this consideration the evidence relating to the offensive odors may be eliminated, there being no allegation in the bill touching this matter; also, the evidence relating to risk from fire, danger of explosion, depreciated value of the property, and the increased rate of insurance; for such wrongs may be adequately redressed at law. This narrows the inquiry to the degree or extent of the noise, smoke, soot, and vibrations. There is a mass of evidence, many witnesses having been examined by both parties, and the testimony is voluminous. The evidence is conflicting in material respects. Appellants' counsel contend, that the testimony of the contradicting witnesses on the part of defendant is entitled to but little weight, for the reason, that but few of them were ever in the house of complainants, and these only for a short time, and the others live at a great distance. Naturally, the noise and vibrations diminish in proportion to distance; but the force of the argument is impaired by the fact, that one of the most material witnesses resides in the dwelling-house owned by complainants, and mentioned in the bill as subject to the same disturbances, and some of the others in dwellings in the same block, while some of complainants' witnesses reside in dwellings in a different block and across the street. The testimony of defendant's witnesses, having a material bearing upon the inquiry, should not be ignored, but accorded such right as it may be entitled to, when the entire evidence and the construction and operation of the plant are considered. We shall not attempt, however, to follow counsel in their

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elaborate discussion of the evidence. Though the testimony of the witnesses on the part of complainants may be somewhat exaggerated by super-sensitiveness, and an excited imagination, it may be conceded that their evidence strongly tends to show material annoyance and inconvenience caused by the smoke, soot, noise and vibration during the administration of Cawthorn, and even for a time after defendant purchased and operated the plant.

The evidence, however, shows that defendant has made alterations and improvements, especially as to the escape of steam, which have greatly diminished the evils complained of. As to an establishment of public utility in a city, the rule is, that its lawful use will not be perpetually enjoined, when, by the application of scientific appliances, such alterations in the machinery may be made as will remedy the evils. In such case, the court will go no further than to require such appliances to be introduced; and in some cases will direct a reference, to ascertain if the evils can be thus remedied.—*Green v. Lake*, 54 Miss. 540; s. c., 28 Am. Rep. 378; 1 High. on Inj., § 787. On the same principle, the court will not make the injunction perpetual, when such appliances have been used, even during the pendency of the suit, and the desired results effected. The real and important question is, does the manner in which defendant operates the plant, since the alterations and improvements were made, interfere with comfortable use and enjoyment of their residence by complainants to such extent as to create a nuisance, which, when the locality and the circumstances are considered, it becomes the duty of the court to enjoin? The witness Long testifies, that the noise has been diminished exceedingly, and that it "is not a hundredth part of what it was before these changes were made;" and Sossaman says, "I could feel no vibration there, but I know that sometimes, while walking down the street, one can feel a little shaking, which is caused by the running of a dray, and I noticed no more vibrations about that place than the running of a dray might cause. At the time I speak of the machinery was in motion." We have especially referred to the testimony of these witnesses, for the reason that Long resides in the dwelling owned by complainants and mentioned in the bill, and Sossaman went to the house at the instance of complainants, to examine and give an opinion; his attention was directly called to the subject. Their evidence is corroborated by the testimony of several other witnesses. There is, however, conflicting evidence on the part of complainants.

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The evidence further shows, that by a comparatively small expense complainants could avoid the inconveniences and annoyances arising from the vibratory motions. When such is the case, a perpetual injunction will not be granted, full compensation being obtainable at law. In *Rosser v. Randolph*, 7 Porter, 238, the bill was filed to enjoin the erection of a mill, which, it was alleged, would be injurious to the health of the neighborhood, and would drown and render useless a spring on which complainant relied to furnish himself and family with pure water. The mill having been erected, and it not appearing that the health of the community had suffered, the court said in reference to the spring: "By the application of labor, the value of which can be ascertained, or which the defendant, if applied to, might be willing himself to do, the spring can be restored to its original state; thereby giving to complainant the full enjoyment of his spring of water, and at the same time securing to the defendant those rights which appertain to him as owner of the adjacent land." Also, in *Kingsbury v. Flowers*, 65 Ala. 479, where the bill was filed to enjoin future interments in a private burial-ground, it is said: "The apprehension of injury from this course, it is evident, could be quieted by but slight labor expended in drainage—a labor, it may be, if requested, the defendant would have performed, rather than to have been forced into this litigation." These were cases in rural districts; the rule is especially applicable to industrial establishments in a large city.

We do not think the evidence shows that the locality in which the plant was situated is so exclusively devoted to industrial enterprises, or business purposes, or so remote, as to afford defendant immunity on this account. The dwellings of complainant and others in the vicinity were erected long before the plant was established. However, a person can not expect to possess, in a city, the peace, quiet, enjoyment and freedom from annoyances of the country, and must submit to the ordinarily incidental annoyances of living in a city. It has been aptly said: "A person who resides in a large city must not expect to be surrounded by the stillness that prevails in rural districts. He must necessarily hear some of the noise, and occasionally feel slight vibrations, produced by the movements and labor of its people, and by the hum of its mechanical industries. The aid of a court may be invoked to keep annoying sounds within reasonable limits. Every noise, however, is not a nuisance, nor, when produced in the exercise of a lawful occupation, should the strong arm of a chancellor be extended

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to suppress it."—*McCaffrey's Appeal*, 105 Penn. State, 253; *Louis. Coffin Co. v. Warren*, 78 Ky. 400; s. c., 57 Amer. Rep. 467. Whether or not the transcendent power of the court should be exercised, under such circumstances, must be determined in view of the relative rights of the parties and the public welfare.—*Gilbert v. Showerman*, 23 Mich. 448.

Unquestionably, the electric plant is of great public utility, and its abatement by injunction would entail heavy loss upon its owners, and, according to the testimony, increased cost of light to the citizens of Mobile. The machinery is of the best quality employed for electrical purposes; its officers and agents are shown to be skillful, and acting in good faith. Efforts have been made with considerable success, and are still being made, to prevent injury and annoyance to the occupants of adjoining dwellings. One of the chimneys is eighty feet high, and the other seventy, forty or fifty feet higher than the roof of complainant's residence, and sufficiently high to discharge the smoke in the air, so as not to incommode complainant, unless in abnormal conditions of the atmosphere, which occur only occasionally. Though the locality in which the plant is situated may not be of such nature as to defeat its abatement, if its operations cause substantial injury to neighboring dwellings, or material annoyance to the occupants; yet, when by the application of scientific appliances, or by the expenditure of a reasonable amount of labor and money, the evils can be obviated, or diminished so as to amount to no more than are ordinarily incident to a city life, the rights of the parties will be preserved, the infliction of heavy loss prevented, and the public interest subserved, by withholding equitable interference, and leaving the complaining party to pursue the legal remedy.

By the settled rule in this State, a case must be proved which establishes the necessity of a preventive remedy—a case within that class of cases of irreparable or continuous injury which can be adequately redressed only by injunction; and in all cases, where the right is doubtful, and the exercise of the power would interfere with industries promotive of public utility, it becomes the duty of the court to abstain from interfering. In such cases, the proof should be clear and convincing, and the power "should be cautiously and sparingly exercised."—*Ray v. Lyons*, 10 Ala. 63; *Rouse v. Martin*, *supra*. A careful examination and review of the mass of evidence forces the conclusion, that complainants have failed to establish, clearly and convincingly, a case of imperative necessity. The evidence leaves the mind in

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doubt, whether complainants have suffered, since the alterations and improvements were made, any substantial injury, or material discomfort, more than is usually incident to a residence in a city, or which could not be prevented by the application of labor or money, that may be adequately redressed at law.

Affirmed.

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Petition by Widow for Allotment of Lands for Homestead.

1. *Plea to jurisdiction.*—In a case pending in the Probate Court, on the petition of a widow for an allotment of lands in lieu of homestead (Code, § 2544), a plea to the jurisdiction which alleges that a bill has been filed to remove the administration and settlement of the estate into the Chancery Court, and that said court has assumed jurisdiction of the suit, is good and sufficient, although it does not set out the bill *in extenso*, and does not allege that the matters embraced in the petition were removed as part of the administration.

2. *Removal of administration into equity.*—The administration and settlement of a decedent's estate is a single continuous proceeding, and when removed into equity for any purpose, that court must proceed to a final and complete settlement of all matters involved, including the widow's petition for an allotment of homestead, or other lands in lieu of homestead.

3. *Assignment of dower in equity.*—When dower can not be assigned by metes and bounds, a court of equity has exclusive jurisdiction to make an assignment.

APPEAL from the Probate Court of Mobile.

Heard before the Hon. PRICE WILLIAMS.

In the matter of the estate of Thomas Dolan, deceased, on the petition of Mrs. Mary Dolan, widow and administratrix, to have certain lots in Mobile allotted to her in lieu of homestead. Said Thomas Dolan died in the city of Mobile, on the 15th September, 1887, intestate, and without children; and letters of administration on his estate were granted to his widow on the 1st October, 1887. Said intestate was seized and possessed at the time of his death of a house and lot in the city of Mobile, which was his homestead, but which was of value more than \$2,000; and he also owned three other small houses and lots in the city, whose aggregate value was about \$2,000, more or less. On the 1st April, 1891, Mrs. Dolan filed her petition in the Probate

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Court, alleging that the homestead was of greater value than \$2,000, and asking that the other lots be assigned to her as exempt in lieu of homestead. On the same day commissioners were appointed by the court to make an appraisement and allotment of the property, and they made their report on the 7th April, 1891, appraising the three lots at \$1,800, and allotting them to the widow in lieu of homestead. On the 27th April, 1891, exceptions to the action and report of the commissioners were filed by the heirs at law, who were the brothers and sisters of the intestate; and a day was appointed for the hearing. On the 18th May, 1891, a plea to the jurisdiction of the court was filed by the widow, as follows: "Since the making of said report by said commissioners, this petitioner has filed her bill in the Chancery Court, praying that said court would take jurisdiction of the settlement of her entire administration, including the assignment to her of said lands in lieu of homestead, referred to in said exceptions; and the said heirs of said Thomas Dolan, since the filing of said bill in said Chancery Court, have filed a cross-bill in said cause, in which they pray that said Chancery Court will take jurisdiction of the whole subject-matter, as prayed in said original bill. On the 24th April, 1891, said heirs made in said Chancery Court a motion for a receiver in said cause, and for the removal of said Mary Dolan as administratrix of said estate. Said court thereupon took jurisdiction of said bill and said cross-bill, and is now proceeding to consider and determine all issues involved in said estate, including the issues presented by said exceptions. Petitioner pleads the foregoing facts as a bar to all further proceedings in this hon. court." The court overruled a demurrer to this plea, and, having postponed a hearing on the exceptions until after the Chancery Court had rendered a decree assuming jurisdiction over the administration of the estate, sustained the plea, and refused to act on the exceptions. Exceptions were reserved to these rulings, and they are here assigned as error.

W. E. RICHARDSON, and THOS. H. SMITH, for appellant.

HANNIS TAYLOR, *contra*.

McCLELLAN, J.—It can not be doubted that the plea to the jurisdiction of the Probate Court was sufficient to present the issue whether the Chancery Court had taken jurisdiction of the administration of Thomas Dolan's estate. All that is necessary to such a plea, we apprehend, is that

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it should state the facts that a bill invoking the jurisdiction of the Chancery Court has been filed therein, and that court has assumed the exercise of such jurisdiction. Whether the bill to that end is sufficient, is a question which properly arises on the trial of the plea. It can not be necessary that such plea should set out the bill *in extenso*; and to hold the plea here insufficient would logically lead to such requirement. There was no error in the rulings of the lower court on the motion and demurrers which were addressed to the sufficiency of the plea.

The only other action of the Probate Court which this record presents for review is its judgment sustaining the plea on the evidence. And the only argument made against the correctness of that action really admits that the Chancery Court had acquired control of the administration generally, and thereby ended the jurisdiction, in a general sense, of the Probate Court. Indeed, the appellants having themselves not only submitted to, but affirmatively invoked the interposition of equity by a cross-bill, were in no position to deny the general jurisdiction of the Chancery Court. But the contention is, that the bill does not specifically pray the Chancery Court to take control of that part of the administration having reference to the setting apart of lands in lieu of homestead to the widow, and hence that as to that matter the jurisdiction of the Probate Court remained intact. If it were conceded that the bill made no reference to this particular part of the administration, the conclusion sought to be drawn from that fact can not be sustained. It needs no argument, and no citation of authority, to show that the setting apart of homestead, or lands in lieu of homestead, is as much a part of the administration of an estate, as much in the way of settling the affairs of the decedent, and disposing of property left by him as the law prescribes, as any other act the personal representative and the courts may do in the administration. And when an administration is removed into the Chancery Court for any purpose, or in any part, it is there in whole, and for all purposes. There can be no splitting up of an administration any more than any other cause of action; it is one proceeding throughout, in a sense, and the court having paramount jurisdiction of it must proceed to a final and complete settlement.

But, aside from the consideration that the argument for appellants is addressed solely to the proposition that a part of the administration, that part which they desired the Probate Court to act upon, was not removed into the Chancery Court, and looking to the bill to determine whether that

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court really had jurisdiction at the time the Probate Court so held, the conclusion must be that the ruling assigned as error was proper. The bill makes a case in respect of the widow's dower right, of which the Probate Court has no jurisdiction. It alleges that dower can not be assigned by metes and bounds, and thus makes a case for exclusive equity jurisdiction.—*Wood v. Morgan*, 56 Ala. 397.

There is no error in the record, and the judgment of the Probate Court is affirmed.

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American Freehold Land Mortgage Co. of London v. Turner.

American Mortgage Co. of Scotland v. Simmons.

Land Mortgage Investment and Agency Co. of America v. Turner.

Bills in Equity by Mortgagees, as Purchasers at Sale under Power, for Receiver of Rents and Crops.

1. *Sale under power in mortgage; purchase by mortgagee.*—A sale of lands under a power in a mortgage, in substantial compliance with its terms, cuts off the equity of redemption as effectually as a decree of foreclosure, leaving nothing in the mortgagor but the statutory right of redemption, and the right to disaffirm the sale if the mortgagee himself became the purchaser at the sale without express authority given by the mortgage; but, if the mortgagor elects to disaffirm the sale on that account, his election must be accompanied with an offer to redeem by paying the amount due.

2. *Rents accruing after sale under power in mortgage; when purchaser is entitled to receiver.*—The purchaser at a sale under a power in a mortgage is entitled to the rents subsequently accruing, even though he be the mortgagee, and was not authorized to purchase; and if the mortgagor and his tenants refuse to attorn to him, are insolvent, and are disposing of the crops, he is entitled to a receiver.

3. *Rents of mortgaged lands after foreclosure; attachment against crops.* When lands subject to a lease are conveyed by mortgage, the mortgagee succeeds to all the rights of the mortgagor as lessor, and the lessee becomes his tenant without attornment (Code, § 1823); but, when the lease is made by the mortgagor after the execution of the mortgage, it is subordinate to the mortgage, and the mortgagee may recover the possession and the rents after the law-day; yet, if the lessee refuses to attorn to him after foreclosure under the power, denying his right to the rents, the mortgagee can not enforce his lien on the crops by attachment (Code, §§ 3056-59-61), being neither the landlord nor his assignee.

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APPEALS from the Chancery Court of Madison.

Heard before the Hon. THOMAS COBBS.

The opinion of the court in these three cases states all the facts material to an understanding of the points decided. The complainant in each case was a foreign corporation, and alleged compliance with the constitutional and statutory provisions authorizing such corporations to do business in Alabama. Each of the bills prayed an injunction to restrain the several defendants from cutting timber, or otherwise committing waste on the lands involved in the suit; and a temporary injunction was granted by Hon. WM. H. SIMPSON, of the City Court of Decatur. Each of the bills also prayed the appointment of a receiver of the rents and crops, alleging that the defendants were each insolvent, and that they were disposing of the crops. Daniel H. Turner, the principal defendant in each case, filed an answer to the allegation of his insolvency, in these words: "Respondent owns property of value more than sufficient to pay his debts, if he could realize its value, but he has not the money to pay his debts now due." "Respondent has not the cash money now to pay his debts, but whether he will be able to pay them or not depends on what can be realized by the sale of his interest in real estate owned by him, and in the collection of debts and claims due him. Respondent's property, at a fair valuation, and the debts due to him, are more than sufficient to pay the debts which he now owes." The several causes being submitted to the Chancellor on motion for the appointment of a receiver, and numerous affidavits being filed as to the value of the land involved, he overruled and refused the motion; and this decretal order is here assigned as error in each case.

HUMES & SHEFFEY, and D. I. WHITE, for appellants.—The foreclosure of a mortgage, by sale under a power given in it, cuts off the equity of redemption as effectually as a decree of foreclosure, leaving in the mortgagor nothing but a statutory right of redemption.—*Comer v. Shehan*, 74 Ala. 458. This principle applies when the mortgagee becomes the purchaser at the sale, though not authorized by the terms of the conveyance; and while the mortgagor may disaffirm the sale in such case, he can only do so by offering to do equity—that is, by offering to pay the amount due, costs, &c. *Amer. F. L. Mortgage Co. v. Sewell*, 92 Ala. 168. As purchaser at the sale under the power, the sale not having been disaffirmed, the complainant is entitled to the rents afterwards accruing, and may recover them by action at law.

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Kirkpatrick v. Boyd, 90 Ala. 449; *Coffey v. Hunt*, 75 Ala. 236; *Tubb v. Fort*, 58 Ala. 279; *English v. Key*, 39 Ala. 113; *Westmoreland v. Foster*, 60 Ala. 448. Being entitled to the rents, the statutory lien on the crops attaches, and it is immaterial whether the statutory remedy by attachment extends to the case—in either case, the complainant is entitled to a receiver of the rents and crops, under the facts of the case.—*Ashurst v. Lehman, Durr & Co.*, 86 Ala. 370; *Westmoreland v. Foster*, 60 Ala. 449; *Beach on Receivers*, § 494; *Tubb v. Fort*, 58 Ala. 261.

D. D. SHELBY, *contra*.—No danger of damage or injury to the real estate is shown, and no case can be found, English or American, where a receiver was appointed in aid of an ejectment at law, unless injury to the property was shown—that is, injury to the improvements, fixtures, ores, &c. *Pfoltz v. Pfoltz*, 14 Md. 376; *Talbot v. Scott*, 4 Kay & J. 96; *Jordan v. Beall*, 51 Geo. 602; *High on Receivers*, 483, note; *Ib.* §§ 554-5; *Beach on Receivers*, §§ 494, 521, 528. When a mortgagee becomes the purchaser at his own sale, not being authorized by the terms of the deed, his only remedy is a bill to require the mortgagor to elect whether he will affirm or disaffirm the sale; and in such a suit a receiver will not be appointed.—*McLean v. Presley*, 56 Ala. 211; *McCall v. Mash*, 89 Ala. 487; *Tyler v. Herring*, 19 Amer. St. Rep. 289, note; *Cunningham v. Rogers*, 14 Ala. 149. The mortgagee, as such, has no right to the rents and profits, and he has no better right as a purchaser at his own sale. *Downs v. Hopkins*, 65 Ala. 508; *Beach on Receivers*, § 554; 2 Jones on Mortgages, §§ 1144, 1886; *McHan v. Ordway*, 76 Ala. 347; *In re Tall. Man. Co.*, 64 Ala. 568.

COLEMAN, J.—These several causes were submitted and argued by counsel as one case, and have been so considered and determined.

The object of the bill was to have a receiver appointed with authority to collect and hold the rents or mesne profits accruing from certain lands until the final determination of a suit in ejectment, which was then pending, and instituted by the plaintiff against the landlord and tenants for the recovery of the land. The averments of the bill show that, in April, 1886, Daniel H. Turner executed his mortgage with power of sale upon the lands to complainant, and that by virtue of this power, after the law-day had expired, the mortgage was foreclosed on the 6th day of July, 1891, at which sale the mortgagee became the purchaser. There was no

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provision in the mortgage which authorized the mortgagee to purchase at his own sale. After sale and purchase, possession was demanded of the mortgagor, and also of the tenants, and demand was also made of the tenants that they attorn to the purchaser as their landlord. These demands were refused. Suit in ejectment was then instituted to recover the land. The averments of the bill show that the relation of landlord and tenant between the mortgagor and the other defendants began after the execution of the mortgage, and existed at the time of the foreclosure. It is further averred that the mortgagor and the other defendants are insolvent, and are making away with the crops, and that unless a receiver is appointed, complainants will lose the rents to which they are entitled as owners of the land by virtue of their purchase at the foreclosure sale.

The answer of the defendant Turner to the allegation that he is insolvent is evasive, and wholly insufficient as a denial. The bill was confessed by the tenant defendants.

There are many affidavits in this record, as to the value of the land; those on the part of the complainants placing the value of the land below the amount of the debt secured by the mortgage, and those by the mortgagor fixing the valuation in excess of the debt. We are unable to perceive the relevancy of these affidavits. The bill is not filed to foreclose the mortgage, and for the appointment of a receiver to secure the rents during the foreclosure suit. The foreclosure was effected by the sale under the power given in the mortgage. It is not pretended that the sale was void. The value of the land is not a question in the case. A foreclosure under a power of sale cuts off the equity of redemption as effectually as a decree of the court. When the mortgagee becomes a purchaser at his own sale, the mortgagor may avoid the sale and redeem in a court of equity; but to do this, he must do equity. It is only upon the offer to do equity that a chancery court will set aside the foreclosure sale. A mere averment in the answer that the sale is voidable as to the respondent, and that he elects to avoid it, without more, is wholly insufficient. It requires either an original or a cross-bill, offering to pay the debt secured by the mortgage, to entitle the mortgagor to have the sale set aside. The authorities are collated in *American Freehold Land Mortgage Co. v. Sewell*, 92 Ala. 168. So long as the foreclosure sale stands, and no affirmative legal steps are taken to avoid it, the purchaser, although he is the mortgagee, must be regarded as the owner of the land. Not being competent to make a conveyance to himself, his title as

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purchaser may be only equitable, and, standing alone, might be insufficient to support ejectment; but, by virtue of his title as mortgagee, both the legal and equitable title becomes united in him, and constitutes a perfect title, subject only to the right of the mortgagor, seasonably expressed in a court of equity, to be let in to redeem.—92 Ala., *supra*.

If plaintiff is entitled to recover rents or mesne profits in his ejectment suit, and is in danger of losing them by reason of the insolvency and misconduct of the mortgagor and the tenants, and the law furnishes no adequate protection and remedy to the plaintiff to prevent the loss in the meantime, it was the duty of the Chancery Court to appoint a receiver, with authority to collect and hold the rents until the final determination of the suit at law. Does the statute give the mortgagee, or a purchaser at a mortgage sale, a right to the writ of attachment against the crops grown on the premises, to secure the payment of the rents and mesne profits which are recoverable in a suit in ejectment?

It is well settled now that fealty and rent are incident to the reversion, and pass with it. When lands subject to a lease are conveyed, the grantee succeeds to all the rights of the grantor, and the lessee becomes the tenant of the grantee without attornment. This rule resulted from the passage of a statute in the reign of Queen Anne, which abolished the rule that attornment by the tenant was necessary to the validity of a conveyance of the reversion. Prior to that time, on account of the duties and obligations of a tenant to his landlord other than the payment of rent, it was not permissible to impose upon a tenant a landlord without his consent. Section 1823 of the present Code is declaratory of the same principles.—*English v. Key*, 39 Ala. 116; *Otis v. McMillan*, 70 Ala. 52. Under a conveyance of a reversionary interest, the contract rights of a lessee which vested anterior to the conveyance are unaffected by the conveyance. The grantee can not enter, or sue in ejectment, or terminate the unexpired lease. His conveyance is subordinate to the lease.

A mortgagor in possession of the mortgaged lands is the owner, against all persons and for all purposes, except as against his mortgagee; but as to him, there being no reservation of right to the possession or to the rents in the conveyance, he is a mere tenant at sufferance. The mortgagee may enter, or bring ejectment to recover possession. But, if he does not enter, or bring ejectment, or give notice that he claims the rents, the mortgagor is entitled to the rents. All payments of rent by his tenants to the mortgagor, be-
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fore entry or notice, will be sustained. After the law-day of the mortgage, the tenants of the mortgagor who have become such after the execution of the mortgage are not the tenants of the mortgagee. The mortgagee's relations to the tenants of the mortgagor, under such circumstances, are entirely different from those which exist between a lessee and his tenants and a mortgagee of the leased premises where the mortgage was made after the contract of lease and tenancy, and before the lease had expired. In the former case, the lease is subordinate to the mortgage; in the latter, the mortgage is subordinate to the lease. The mortgagor may claim the rents after the law-day, and after notice may recover the rent which accrues thereafter; but the right to recover rents in such cases does not grow out of the relation of landlord and tenant. It is the right to recover for the use and occupation of his premises, the value of which is fixed by the rental agreement, where he gives notice that he will claim the rents. The tenants, by attorning to the purchaser or mortgagee, may create, as between them, the relationship of landlord and tenant; but, if the tenants refuse to do so, and deny his right to the possession or the rents, there is no contract of tenancy, express or implied. The lien given by statute is an incident to tenancy created by contract, express or implied. Under the statute, it may be enforced by attachment at the suit of the landlord, or his assignee; but the right of attachment to enforce the landlord's lien is not given by the statute to one who has no relation of privity, or contract with the tenant. These conclusions are fully sustained by the following authorities: *Drakeford v. Turk*, 75 Ala. 340; *Coffey v. Hunt*, *Ib.* 236; *Tucker v. Adams*, 52 Ala. 254; *Scott v. Ware*, 65 Ala. 180; *Otis v. McMillan*, 70 Ala. 49; *Comer v. Shehan*, 74 Ala. 452; *Kirkpatrick v. Boyd*, 90 Ala. 449.

Sections 1879 and 1880 of the Code read as follows: Section 1879: "Where real estate, or any interest therein, is sold under execution, or by virtue of any decree in chancery, or under any deed of trust, or power of sale in a mortgage, the same may be redeemed by the debtor from the purchaser, or his vendee, within two years thereafter, in manner following." Section 1880: "The possession of the land must be delivered to the purchaser, within ten days after the sale thereof, by the debtor, if in his possession, on demand of the purchaser or his vendee. If the land is in the possession of a tenant, notice to him by the purchaser, or his vendee, of the purchase, after the lapse of ten days from the time of the sale, and that it has

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not been redeemed, vests the right to the possession in him, in the same manner as if such tenant had attorned to him." These two sections were first adopted in the Code of 1852, and constitute a part of the system declaring and regulating the relation of a defendant debtor and the purchaser, after his land has been sold under execution, and of a mortgagor and purchaser at mortgage sale, and the exercise of the statutory right of redemption. Section 1880 declares, that if the land is in possession of the debtor, on demand he must deliver it to the purchaser. "If in the possession of a tenant, notice to the tenant vests the right to the possession in him, in the same manner as if the tenant had attorned to him." The latter clause was not intended to create the relation of landlord and tenant between the purchaser and the tenant of the mortgagor. To so hold would lead to the conclusion, that a mortgagor, by a letting subsequent to the mortgage, could invest his tenant with a greater interest than he himself possessed. Followed out, it would enable the mortgagor, by a long lease for an inconsiderable consideration, to defeat entirely the security of the mortgage. We have uniformly held, as the authorities cited above show, and to which many others might be added, that a mortgagor is a mere tenant at sufferance of the mortgagee, who may treat him and his tenants as trespassers, and evict them at pleasure. This could not be the case, if the law legally imposed the relation of landlord and tenant. So, contracts relative to the mortgaged property, subsequent to the mortgage, by every principle of law are subordinate to it, and the mortgagee's right of entry. The provision that notice by the purchaser to the tenant "vests the right to the possession in him in the same manner as if such tenant had attorned to him," was intended to cut off from the tenant any defense against the right of the purchaser to the possession of the property. When a contract of tenancy has expired by its own provisions, the landlord is vested with the right to the possession, and the tenant can not dispute the right. So, when the relation of tenancy is entered into after the execution of a mortgage, and the mortgage is foreclosed, and the land is in possession of the tenant, notice to him under the statute terminates the tenancy, and vests in the purchaser the possession as completely as if such tenant had attorned to the purchaser instead of his landlord, and the contract of lease had terminated by its own limitations, instead of having been terminated by the notice given by the purchaser to the tenant. The tenant can not dispute the right to the possession in Vol. 95.

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the one case any more than in the other. The statute was never intended to invest in a tenant of the mortgagor a greater estate than the mortgagor possessed.

Under the principles declared in the foregoing authorities, and our construction of sections 1880-81 of the Code, it follows that plaintiff had no right to the writ of attachment, and it is evident that the remedy offered plaintiff by a court of law under the facts of the case was wholly inadequate to secure him the collection of any rents or mesne profits which might be awarded him for the detention of his property in his ejectment suit.

We think the case made by the bill and answer of Turner, considered in connection with the decrees *pro confesso* against the tenant defendants, entitled the complainants to the appointment of a receiver.

Reversed and remanded.

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Bill in Equity for Injunction of Warehouse at River Landing.

1. *Statute of frauds; when available on demurrer*.—When relief is sought in equity founded on a contract which is obnoxious to the statute of frauds, and that fact appears on the face of the bill, the benefit of the statute as a defense may be invoked by demurrer.

2. *Contract for sale of interest in lands; partial performance*.—A verbal promise or undertaking by defendant not to erect or allow the erection of a warehouse at his landing on a navigable river, if complainant would purchase the adjoining land above, erect a warehouse on it, and store his freight free of charge, is void under the statute of frauds (Code, § 1732); and it is not taken out of the operation of the statute on the ground of part performance, because the complainant, on the faith of the promise, bought the land above, erected a warehouse on it, and stored defendant's freight free of charge for several years.

3. *Estoppel by words or conduct*.—The breach of a mere executory promise or undertaking does not constitute an estoppel *en pais*, no element of fraud intervening, even though the party complaining, having acted on the faith of the promise, is injured by the breach.

APPEAL from the Chancery Court of Clarke.

Heard before the Hon. W. H. TAYLOR.

The bill in this case was filed on the 25th September, 1889, by Burrell A. Clanton, against W. L. Scruggs, John L. Scruggs, and Robert C. Long; and prayed an injunction restraining the defendants "from carry-

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ing on the warehouse business at Ball's Bluff, immediately below Coffeerville Landing on the Tombigbee river, or authorizing any other persons to carry on said business at that place;" and for other and further relief under the general prayer. The Chancery Court sustained a demurrer to the bill, on the ground that the alleged agreement was void under the statute of frauds; and this decree is here assigned as error.

WM. S. ANDERSON, for appellant.—(1.) The agreement set up in the bill related only to the user or non-user of the land, and was not within the terms of the statute of frauds. 8 Eng. & Amer. Encyc. Law, 703; *Leinan v. Smith*, 11 Humph. Tenn. 308; *Fleming v. Ramsey*, 46 Penn. St. 252; *Storms v. Snyder*, 10 Johns. 109; *Rice v. Roberts*, 24 Wisc. 461; *Brown v. Morris*, 83 N. C. 251. (2.) If the alleged agreement was within the terms of the statute of frauds, it was taken out of the statute by part performance. *German v. Machin*, 6 Paige, 288; 3 Paige, 545. (3.) W. L. Scruggs is estopped by his conduct from setting up the invalidity of the agreement, on the faith of which complainant has acted.—*McPherson v. Walters*, 16 Ala. 714; *Hendricks v. Kelly*, 64 Ala. 388, 57 Ala. 193; *A. G. S. Railroad Co. v. S. & N. Ala. Railroad Co.*, 84 Ala. 578; *Caldwell v. Smith*, 77 Ala. 157; Green. Ev. §§ 27, 207.

TORREY, PILLANS & TORREY, and W. D. DUNN, *contra*.

WALKER, J.—In 1881 a Mrs. Foster owned a tract of land in Clarke county, which included what is known as the "Coffeerville Warehouse and Landing" property on the Tombigbee river. William L. Scruggs, one of the defendants to the bill in this case and an appellee here, owned a strip of land on the river adjoining and immediately below Mrs. Foster's tract, and on which was a public ferry owned and conducted by him. Burrell A. Clanton, the complainant in the bill and the appellant here, proposed to Scruggs to join him in the purchase of Mrs. Foster's land and in carrying on the warehouse business thereon. Scruggs declined this proposition, but, as alleged in the bill as amended, "said Scruggs said further, however, that he hoped orator would purchase the Coffeerville Warehouse and carry on the business. Said William L. Scruggs stated further to orator, as an inducement to his purchasing said Coffeerville 'Warehouse and Landing,' that if orator would purchase said 'Warehouse and Landing,' and would store all of his

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(Scruggs') freight free of charge, and be responsible for it just as if he was paid storage, that he would promise orator that he never would put up a warehouse on his little strip of land immediately below Coffeetown Landing himself, and he would never suffer anyone else to put up a warehouse on said land. Orator then told said defendant Scruggs that this arrangement was entirely satisfactory to him, that he accepted it, and that he would carry it out." It is shown by the bill as amended that the complainant, acting under this contract and agreement with Scruggs, very shortly thereafter purchased Mrs. Foster's tract of land, erected a new warehouse and other improvements thereon, and from February, 1882, carried on there the warehouse business, and received and stored freight for Scruggs, free of charge, as provided by the agreement with him; that the agreement with Scruggs was a great part of the inducement to the complainant for the undertaking. It is further shown by the amended bill that, in 1887, Scruggs permitted his son and son-in-law, who are parties defendant, and were fully aware of the agreement above mentioned, to erect a warehouse on his land referred to in the agreement, and they are conducting a warehouse business thereon in opposition to the business of the complainant. The purpose of the bill is to have the defendants restrained from conducting the warehouse business on the land of Scruggs above mentioned. It is charged that the conduct of that business causes irreparable injury to the business of the complainant. The demurrers to the bill as amended were sustained, and, the complainant declining to amend his bill further, it was dismissed.

It clearly appears from the averments of the bill as amended that the alleged agreement between the complainant and W. L. Scruggs was oral, and was not evidenced by any writing. That being the case, the question of the effect of the statute of frauds upon the validity of the contract is properly raised by a demurrer.

A privilege which the proprietor of one tenement has, in respect to a neighboring tenement, to require the owner of the latter or servient tenement to suffer to be done or to abstain from doing something on his own lands for the benefit or advantage of the owner or proprietor of the former or dominant tenement, is an easement or servitude. A common form of such an easement or servitude is the prohibition of the proprietor of the servient estate from erecting or permitting the erection of a certain character of structure thereon, or from carrying on or permitting to be carried on

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a particular kind of business or occupation thereon. *McMahon v. Williams*, 79 Ala. 288. The right of the dominant owner, in such case, is an interest in the servient estate; and a contract for the sale of such an interest is a contract for the sale of an interest in lands, tenements, or hereditaments, within the meaning of the provision of the statute of frauds on this subject.—Code, § 1732; *Riddle v. Brown*, 20 Ala. 412; 6 Am. & Eng. Encyc. of Law, 143. There is no pretense in this case that Clanton was in any way put in possession of the land of Scruggs, in which he claims an interest as the beneficiary of an easement. There having been no writing at all in reference to the matter, and the purchaser not having been put in possession by the seller, the alleged agreement was void under the statute of frauds.

The fact that the complainant has performed and continues to perform the undertaking on his part to store Scruggs' freight free of charge, and to be responsible for it just as if he were paid storage, and that Scruggs has accepted the benefit of this stipulation in his favor, can not have effect to take the alleged agreement out of the influence of the statute of frauds, or to estop Scruggs from availing himself of the protection of that statute. An essential element of an estoppel *en pais* is a false representation, or a concealment of material facts, upon which another has been induced to act to his prejudice. The representation or concealment must, in all ordinary cases, have reference to past or present facts. A mere promise of something to be done in the future is not such a representation or concealment. One's failure to perform a promise is a very different thing from his denial of a state of facts which he had previously held out as in existence. The rule which precludes a person from claiming that the facts of a matter are different from what he represented them to be to another, who has acted on the faith of his former statements, is not to be applied to prevent a party from setting up the invalidity of a mere executory contract. One party to an invalid executory agreement is not entitled to hold the other party to the agreement just as if it had been originally valid, because the latter has received the benefit of a part performance by the former. The fact that one of the parties to such an agreement has acted on the faith of its validity does not raise up an estoppel against the other party to deny that it is binding on him. A mere breach of promise can not constitute an estoppel *en pais*.—*Weaver v. Bell*, 87 Ala. 385; *Starry v.* Vol. 95.

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Korab, 65 Iowa, 267 ; *Jackson v. Allen*, 120 Mass. 64 ; *Langan v. Sankey*, 55 Iowa, 52.

If the promise is made fraudulently, and is not meant to be kept, it is not denied that this circumstance might introduce an element of estoppel into the transaction.—Bigelow on Estoppel, (5th Ed.) 576. This question, however, is not decided, as there is no such feature in the present case. There is no allegation of fraud on the part of Scruggs, or that at the time of his alleged promise he did not intend to perform it. The case made by the bill is simply that of an executory contract which can not be enforced because it is void under the statute of frauds. In *Weaver v. Bell*, *supra*, it was said : "A representation relating to future action or conduct operates as an estoppel only when it has reference to the future relinquishment or subordination of an existing right, which it is made to induce, and by which the party to whom it was addressed was induced to act." The representation there referred to does not include a mere promise to do or to refrain from doing something in the future. It could not have been intended to assert that an invalid executory agreement may be made binding by means of an estoppel resulting from the fact that one of the parties has acted on the faith of its validity. It is true that a disavowal of a present right, which might otherwise be asserted in the future, may be treated as the representation of an existing state of fact. But an executory agreement which is void under the statute of frauds can not be made effectual by estoppel, merely because it has been acted on by the promisee, and has not been performed by the promisor. *Brightman v. Hicks*, 108 Mass. 246. Such a rule of estoppel would take the sting out of the statute of frauds, and defeat its manifest purpose. The amended bill in this case shows that the alleged right upon which the complainant relies as the basis of his claim to relief depends upon an executory agreement which was within the statute of frauds, and that the provisions of that statute were not conformed to in the making of the agreement. The grounds of demurrer suggesting the invalidity of the agreement because of such non-conformity were properly sustained.

Affirmed.

Hoskins v. Hight.

Action on Promissory Note, by Payee against Maker.

1. *New trial, on ground of accident, mistake, or surprise.*—When a party applies for a new trial in an action at law, on the ground of accident or mistake operating a surprise, such as the failure to summon material witnesses, which was not discovered until the cause was called for trial, or after the trial was begun, he must show that he then moved for a continuance, or took other proper steps to postpone the trial until the attendance of the absent witnesses could be procured.

2. *Same.*—A new trial should not be granted on account of the absence of material witnesses who were never summoned, where it appears that the clerk was never instructed to summon them; and it is immaterial whether the failure to so instruct the clerk was the fault of the party himself, his attorney, or his attorney's clerk.

APPEAL from the City Court of Anniston.
Tried before the Hon. B. F. CASSADY.

BLAKWELL & KEITH, for appellant, cited *White v. Ryan*, 31 Ala. 400; *Shields v. Burns*, 31 Ala. 535; 16 Amer. & Eng. Encyc. Law, 533-4.

CALDWELL & JOHNSTON, *contra*.

STONE, C. J.—This appeal is taken from the rulings of the lower court in granting to defendant a new trial. Demurrers being sustained to several grounds of the motion for a new trial, only the second ground of said motion remained, and it was upon this ground the court granted the new trial. The defendant was, therefore, granted a new trial, because "he was prevented from making his defense thereto by accident or mistake, and without fault on his part." The only evidence contained in the record is that introduced on the motion for a new trial; and this evidence consisted of affidavits of the defendant, his counsel, and a clerk in the latter's office. The defendant's affidavit sets out the facts that constitute his defense to the suit. His attorney's affidavit averred that, upon the defendant stating to his firm the matter of his defense, and giving him the names of the witnesses by whom this defense was to be proved, the "affiant's recollection is that, before the trial of

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said cause, he instructed W. P. Archer, a young man in the employ of said firm, to have the clerk of the City Court [the court in which the cause was pending] issue subpoenas for said witnesses to be present at the trial, and affiant's first information that they were not subpoenaed was when the case was called for trial." The affidavit of W. P. Archer was, that he had no recollection as to any instructions to have the clerk of the City Court to subpoena the desired witnesses, "and he took no steps to have such subpoenas issued." The only proceedings had in the trial of the case, that are shown by the record, are the filing of the summons and complaint, the filing of a plea by defendant, through his counsel, setting out his defense to the suit, and the rendering of judgment by the court. This judgment, as set out in the record, is as follows: "Came the parties by attorneys, and plaintiff withdraws his replication to defendant's plea; and this cause being submitted to the court, after proof shown, it is considered by the court that the plaintiff recover of the defendant," &c.

We have taken the trouble to set the facts out in detail, in order that our ruling may be the more clearly understood. The appeal is taken under authority of the act "to allow appeals to the Supreme Court from decisions of the City and Circuit Courts in this State, granting or refusing to grant motions for new trials," approved February 16, 1891. Acts 1890-91, p. 779. Our authority for reviewing the ruling of the lower court in this case, by which he granted a new trial, is given in the last clause of the said act, in the following language: "And the Supreme Court shall have the power to grant new trials, or to correct any errors of the Circuit or City Court in granting or refusing the same."

The power to set aside verdicts and grant new trials is inherent in our courts of common-law jurisdiction; and in the exercise of this power the court is called upon to use its equitable discretion to prevent a palpable and material wrong. As said by CLOPTON, J., in *Cobb v. Malone*, 92 Ala. 630, "The power is essential to prevent irreparable injustice, in cases where a verdict wholly wrong is the result of inadvertence, forgetfulness, or intentional or capricious disregard of the testimony, or of bias or prejudice, on the part of juries, which sometimes occurs."

When, in the exercise of this inherent power, the trial court grants a new trial, the presumption is that it has rightfully used its discretion; but, if the contrary appears, and it is plainly shown that the trial court has abused its power, this discretion, being judicial in its character, should be

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revised on appeal.—*Edsall v. Ayres*, 15 Ind. 286; *Lloyd v. McClure*, 2 Greene (Iowa), 139; *Frieley v. David*, 7 Iowa, 3.

The grounds upon which a new trial may be granted are as varied as the circumstances of each individual case. In the exercise of a sound discretion, the court must consider the particular surroundings, and have special regard to the equitable demands of each separate case. But text-writers and different courts recognize many different grounds for the granting of new trials. Surprise and mistake are placed in this category; and there are many instances where new trials have been granted, because one party to a suit has been taken by surprise, or has been prejudiced, on account of a mistake or inadvertence for which he was not responsible, and which was not occasioned in any way by his negligence. No doubt it was intended that the ground upon which the new trial in this case was asked and granted should receive its force and efficacy from this division of the causes that justify such equitable interposition by the court. We shall so consider it; for the ground as stated in the motion is, that the defendant "was prevented from making his defense thereto by accident or mistake, and without fault on his part."

In order to obtain a new trial on the ground of mistake and surprise, there are certain requirements which must be fulfilled as conditions precedent to the exercise by the trial court of this discretion. It must be shown that the surprise or mistake occurred in reference to some matter material to the issue involved; that injury resulted therefrom, and that the party asking for a new trial has not been guilty of negligence or fault in the premises.—*Beadle v. Graham*, 66 Ala. 102; *Brooks v. Douglass*, 32 Cal. 208; *Jackson v. Worford*, 7 Wend. 62; *Huber v. Lane*, 45 Miss. 608; *Walker v. Kretzinger*, 48 Ill. 502; *Fretwell v. Laffoon*, 77 Mo. 26; 16 Amer. & Eng. Encyc. Law, p. 532.

The first duty of a party surprised at the trial, or upon the discovery of a mistake that will prejudice his interest, is to take proper legal steps to continue or delay the cause; for "he can not neglect this in the hope of securing a verdict in spite of the surprise (or mistake), and then obtain a new trial." In the case of *Shipp v. Suggett*, 9 B. Monroe (Ky.) 5, the court observed: "The correct practice in such case is for the party at once, upon the discovery of the cause, during the progress of the trial, which operates as a surprise on him, to move a continuance or postponement of the trial, and not attempt to avail himself of the chance of obtaining a verdict on the evidence he has been able to

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introduce, and if he should fail, then to apply for a new trial on the ground of surprise. To tolerate such a practice would have the effect of giving to the party surprised an unreasonable and unfair advantage, and tend to an unnecessary and improper consumption of the time of the court." We approve this language, and announce the rule, that before a party can be granted a new trial on the ground of surprise and mistake, which was known or discovered before or during the trial, he must first move for a continuance, or take such legal steps to postpone the trial of the cause as the circumstances of the particular case may require. *Washer v. White*, 16 Ind. 136; *Young v. Com.*, 4 Gratt. 550; *Gee v. Moss*, 69 Iowa, 709; *Wells v. Sanger*, 21 Mo. 354; *Rogers v. Hine*, 1 Cal. 429; *Bell v. Gardner*, 71 Ill. 319; *Doyle v. Sterga*, 38 Cal. 459; *Dewey v. Frank*, 62 Cal. 343; 16 Am. & Eng. Encyc. of Law, p. 533. This motion for a continuance, or effort to postpone the trial, is affirmative matter, and should, therefore, appear of record. In its absence, this court can not presume such motion or effort was made; and the cause must be considered in the light of such facts and matters of record as appear in the transcript. This conclusion is decisive of the only question presented by this appeal, for no motion for a continuance, nor any effort to postpone the trial, was made when the absence of the important witnesses was discovered. The trial court should not have granted the motion for a new trial, under the circumstances shown in the record.

We could rest our opinion here; but, considering that this phase of the question has never before been presented to us for review, we deem it best to decide the correctness of the lower court's ruling in granting a new trial upon the ground stated in the opinion, and the evidence produced to substantiate such ground.

The accident or mistake that prevented the defendant from making his defense, was the absence of certain witnesses, whose names he had given to his counsel to have summoned. These witnesses were never subpoenaed, and this is, no doubt, at least one of the reasons they were absent. These witnesses were not subpoenaed by reason of the mistake or negligence of defendant or his counsel, whose recollection was that counsel directed his clerk to have the clerk of the court subpoena the witnesses. The clerk had no recollection of any such direction, and never instructed the clerk of the court to subpoena the said witnesses.

While it is true that a new trial may be granted to a party who was deprived of the benefit of the evidence of a witness

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who was excusably absent, and whose testimony would have probably affected the result, yet, in order to claim the benefit of a new trial on this ground, it must, as a general rule, be shown that the witnesses had been regularly summoned, and that their absence was not caused through the negligence of the party asking for a new trial. As said in 16 Amer. & Eng. Encyc. of Law, 541, "It is a general rule, that a new trial should not be granted on account of the absence of witnesses, when a continuance has not been asked for, or the absence of witnesses is caused by any form of neglect by the party applying for a new trial."—*Huhland v. Sedgwick*, 17 Cal. 123; *Tilden v. Gardiner*, 25 Wend. (N. Y.) 663; *Love v. Breedlove*, 75 Tex. 649; *Gee v. Moss*, 68 Iowa, 318; *Young v. Com.*, 4 Gratt. (Va.) 550; *Wells v. Sanger*, 21 Mo. 354; *Rogers v. Hine*, 1 Cal. 429.

The result is the same, whether the absence of the witnesses was caused by the mistake or negligence of the party, or of his attorney. "The mistake or negligence of the attorney appearing for the party to a suit is the mistake or negligence of the party; and no new trial will be allowed where such mistake arises from negligence or lack of skill."—*Handy v. Davis*, 38 N. H. 411; *Heath v. Marshall*, 46 N. H. 40. The failure to make defense to a suit, by reason of a mistake of the defendant or his counsel, caused by negligence, can not justify the granting of a new trial, it matters not how effective or just the defense may be.—16 Amer. & Eng. Encyc. of Law, 549, n. 4.

Under the principle above announced, the judgment of the City Court granting a new trial is reversed, and a judgment is here rendered overruling the defendant's motion for a new trial.

Reversed and rendered.

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Mandamus to Chancellor on Order Discharging Injunction.

1. *Authority of judge of City Court of Montgomery to grant injunction.* The judge of the City Court of Montgomery has authority, equally with a circuit judge or chancellor, to grant an injunction in a case pending in Colbert county.

2. *Fiat for injunction before bill filed.*—A fiat for an injunction, granted by the judge to whom the bill is presented before being filed in court, Vol. 95.

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is not void, but a mere irregularity; and the irregularity is waived by a motion to dissolve the injunction after answer filed.

3. *Dissolving or discharging injunction in vacation.*—A motion to dissolve an injunction, either for want of equity in the bill, or on the denials of the answer, may be made and acted on in vacation (Code § 3532); but the statute does not apply to a motion to discharge an injunction, nor authorize the chancellor to discharge it in vacation.

4. *When appeal lies, or mandamus.*—An appeal is given by statute from an order dissolving an injunction in vacation (Code, § 3818), but the statute does not include an order discharging an injunction; and there being no other adequate remedy, a *mandamus* will be awarded by this court to vacate such order.

PETITION by H. A. Sayre, R. B. Snodgrass and S. M. Levin, as trustees appointed in a deed of assignment executed by Moses Brothers, for a *mandamus* directed to Hon. THOMAS COBBS, presiding in the Chancery Court of Colbert county, requiring him to vacate an order discharging an injunction in vacation, under the facts stated in the opinion.

TOMPKINS & TROY, STRINGFELLOW & LEGRAND, for the petitioners, cited High on Injunctions, § 1583; *E. & W. Railway Co. v. E. T., Va. & Ga. Railroad Co.*, 75 Ala. 278; *Jones v. Ewing*, 56 Ala. 360; 3 Brick. Digest, 626, § 31.

COLEMAN, J.—A bill was brought by the petitioners as assignees of Moses Bros. and the individual members of the firm, for the purpose of restraining the defendant, A. H. Kellar, from selling certain real estate under a power of sale contained in a mortgage executed to him by M. L. Moses. The order for a provisional injunction was made by the judge of the City Court of Montgomery before the filing of the bill, but the writ of injunction did not issue until after the bill was filed. The defendant, after answering, made a motion to dissolve the injunction on the following grounds: *first*, that the answer denies the material allegations of the bill; *second*, that the bill is without equity; *third*, that the judge of the City Court was without jurisdiction to make an order granting the injunction at the time it was made. The chancellor, being of the opinion that the bill contained equity, and that the denials of the answer were not sufficient to dissolve the injunction, did not dissolve the injunction, on either of the first two grounds; but he made an order *discharging* the injunction, on the ground that the order for its issuance, having been made when no suit was pending, was void. This proceeding is an application by the complainants for a *mandamus*, commanding the chancellor to set aside the order discharging the injunction.

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By the act creating the City Court of Montgomery, power is conferred upon the judge "to order the issue of writs of injunction, or any other writ or process, in any and every case in which, by the existing laws, a circuit judge might order the issue of any such like writ or process."—Acts 1863, p. 121. By the laws then existing, judges of the Circuit Court had, and now have, authority to grant writs of injunction returnable into the courts of chancery, co-extensive with the power exercised by chancellors. The question therefore is, whether the order of a chancellor granting a temporary injunction before the bill is filed, is void, or a mere irregularity.

The point, that a restraining order before the suit is instituted is without authority and void, was made in *Hayman v. Landers*, 12 Cal. 107. This point was held to be untenable, notwithstanding a statute expressly provided that an injunction may be granted at the time of issuing the summons. Field, J., says: "The order could only take effect upon the filing of the complaint, and the bond or undertaking required, and it was unnecessary to delay the application to the judge until after the complaint had been filed. When a restraining order, or an injunction, is sought upon the complaint, it is the usual practice to present the complaint, in advance of the filing, to the judge, and obtain the order on the allowance of the writ; and with this practice the statute does not conflict. The order or writ can then be issued with the summons." We have no statute regulating, expressly or impliedly, the time when an injunction may be granted. Mr. High observes: "The fact that the bill was not filed until after the injunction was ordered, is not sufficient ground for a reversal of the order, such omission being at the most but a mere irregularity which does not affect the merits of the cause."—High on Inj., § 1583. And in *Davis v. Reed*, 14 Md. 152, it was held, the fact that the bill was not filed until after the injunction was ordered is, at most, but a mere irregularity, which can not operate a reversal of the order granting it. It is said: "It is not uncommon, in some of the counties, to proceed in this way. . . Where a practice has become inveterate, it is better to adhere to it, until changed by a prospective rule, than to incur the risk of doing injustice to a party who may have followed it, and especially when the opposite side has not been injured by the alleged irregularity." Also, though where the application for an injunction is made by another, under the English practice the motion could only be made on some day on which the court was sitting, and is made

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ex parte, and before the defendant had entered an appearance, a certificate of the filing of the bill signed by one of the authorized clerks was requisite.—2 Dan. Ch. Pl. & Prac. 1667, 1669. Yet, in an urgent case, an *interim* injunction may be granted without notice that the motion for an injunction would be made; but this authority does not go to the extent of holding that the bill should not be first filed. So, in *Thornloe v. Shonies*, L. R. 16 Eq. 126, an *interim* injunction to restrain a sale which was expected to be completed within an hour, upon the plaintiff giving an undertaking to file the bill and affidavit in the course of the day, on the ground that plaintiff did not have time to prepare a copy of the bill for filing, the injunction was granted. And in *Carr v. Morris*, *Ib.* 125, where, on account of the office of the court being closed, the filing of the bill was delayed, it was held the court might grant an injunction before bill filed; but in this case the chancellor filed the copy of the bill produced to him, and directed that it be marked filed as of the day the injunction was granted, remarking that he felt bound to act as if the bill was filed before him on the day the application was made.

While we have found no authority declaring directly that it is a proper practice to grant the issue of an injunction before the filing of the bill, the authorities are abundant which hold that such an order before filing the bill is not void, but at most is a mere irregularity.

In the case of *Eust. & West. R. R. Co. v. East Tenn., Va. & Ga. R. R. Co.*, 75 Ala. 375, it is declared, "A motion to dissolve an injunction can be founded only on a want of equity apparent on the face of the bill, or on a full and complete denial, by the verified answer of a material defendant, of the allegations upon which the equity of the bill depends. The motion itself is a waiver of the error or irregularity, if any, which may have attended the order for the issue of the writ, or which may be in the writ alone. These are available only upon motion for a discharge of the injunction, which must precede any act on the part of the defendant, in recognition or affirmance of its regularity." And in *Jones v. Ewing*, 56 Ala. 362, it was held, "If the injunction has been irregularly granted, . . . the remedy is not by a motion to dissolve. Such motion, founded as it can be only on a want of equity in the bill, or the full and complete denial of its equity by the answer, is a waiver of the irregularity, if any has occurred in the grant of the writ." A number of authorities are cited in support of the rule of law as declared.

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In *Parker v. Williams*, 4 Paige Ch. Rep. 439, it was held that "an irregularity in the service of the injunction was waived by the defendant voluntarily appearing and putting in his answer. It was therefore too late for him to make the objection, after such a lapse of time, and after those proceedings had taken place. When a party seeks to set aside the proceedings of his adversary upon a technical irregularity, he must make his application the first opportunity he has for that purpose."

We are of opinion that the Chancery Court was without jurisdiction to render a decree in vacation, discharging the injunction, and in decreeing the order granting the injunction to be void. We are further of the opinion that the filing an answer, and moving the court to dissolve the injunction for want of equity, and upon answer, was a waiver of the irregularity in granting the injunction before the bill was filed.

The only remaining question is, whether petitioner's remedy is by *mandamus* or appeal. The statute provides, that a defendant may move to dissolve an injunction in vacation before the chancellor. The cause was regularly submitted to be heard in vacation upon the motion to dissolve the injunction, and it was at this hearing the chancellor erroneously *discharged* the injunction.

The court has no authority to hear and determine, in vacation, motions which involve mere interlocutory orders and decrees, except as authorized by statute. The statute (Code, § 3532) provides, that "a defendant may move to dissolve an injunction in vacation before the chancellor of the division in which the bill is filed, either for want of equity, or on the coming in of the answer," &c.; and section 3613 provides, that "an appeal lies to the Supreme Court on all interlocutory orders, in term time or vacation, sustaining or dissolving injunctions," &c.

Under the first statute cited, the power of the court to hear motions to dissolve an injunction in vacation is limited to cases where the motion is based upon a "want of equity, or on the coming in of the answer." The decisions of this court, *E. & W. R. R. Co. v. E. T. Va. & Ga. R. R. Co.* 75 Ala., *supra*, and *Jones v. Ewing*, 56 Ala., *supra*, and authorities cited, recognize a marked distinction between a motion to discharge an injunction and a motion to dissolve an injunction. They are made to rest on entirely different grounds, and in fact, the filing of an answer and motion to dissolve is held a waiver of the right to move for a discharge of the injunction. We have seen that the statute

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confers no authority upon the chancellor to hear in vacation a motion to discharge an injunction, and without judicial interpolation this court can not hold that such power was rightfully exercised.

The right of appeal from an interlocutory order made in vacation by the chancellor, improperly discharging an injunction, is not covered by the statute, which grants appeals from interlocutory orders made in vacation. A party injuriously affected by such erroneous ruling has no remedy to correct the error except by the writ of *mandamus*. A different practice prevails in some of the States.—*West v. Smith*, 1 Green's Ch. 309; 8 Paige, 45; *Parker v. Williams*, 4 Paige, 439; *Leffingwell v. Chane*, 5 Bosw. 703; *Blair v. Boggs*, 31 Penn. St. 274.

The defect in the statute, omitting to provide for the hearing of a motion to discharge an injunction in vacation, as is provided for hearing motions to dissolve an injunction, may lead to serious mischief, but the power to remedy the defect rests only with the legislature.

A decree will be here rendered, that a peremptory writ issue commanding the chancellor to set aside and vacate the order discharging the injunction, unless at the first term of the Chancery Court of Colbert county held after being informed of this order, the order discharging the injunction, mentioned in the petition, is set aside and vacated, and the injunction is reinstated.

The above opinion was in part prepared by the late Mr. Justice CLOPTON.

THORINGTON, J., not sitting.

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Statutory Detinue for Mules and Wagon, by Mortgagee against Mortgagor.

1. *Execution of deed or mortgage; signature by mark.*—A mortgage, or other conveyance, to which the grantor's name is signed by mark, duly witnessed by a third person who signs his own as a witness, is legally and efficiently executed, although the grantor's name, he not being able to write, was written by the grantee himself.

APPEAL from the Circuit Court of Clarke.
Tried before the Hon. WM. E. CLARKE.

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This action was brought by W. J. Johnson & Co., suing as a partnership, against Bevily Davis, to recover a wagon and two mules; and was commenced on the 10th October, 1889. The only plea was "the general issue, in short by consent." The plaintiffs claimed the property under a mortgage, or crop-lien for advances, which was dated May 12th, 1888, and to which the defendant's name was signed by mark, attested by R. W. Davis. W. J. Johnson, one of the plaintiffs, testified in their behalf on the trial, that he wrote the instrument, and also wrote the defendant's name at the bottom, at his request; that R. W. Davis, the subscribing witness, "read the mortgage and note over to said Bevily Davis, and held the pen while Bevily made his cross mark, and then signed his own name as a witness; and that R. W. Davis had since died, but witness knew his handwriting, and saw his signature to the instrument. On this evidence, the plaintiffs offered the mortgage in evidence, but the court excluded it, on objection by the defendant; to which ruling the plaintiffs excepted, and then took a non-suit.

JNO. Y. KILPATRICK, for appellants, cited Code, § 1; *Beckley v. Keenan & Co.*, 60 Ala. 293; *Brown v. Bank*, 6 Hill, 443; *Wimberly v. Dallas*, 52 Ala. 196; *Ala. Warehouse Co. v. Lewis*, 56 Ala. 514.

GEO. W. TAYLOR, *contra*, cited *Carlisle, Jones & Co. v. Campbell*, 76 Ala. 247.

McCLELLAN, J.—The case of *Carlisle et al. v. Campbell*, 76 Ala. 247, is relied on to sustain the ruling of the Circuit Court, to the effect that the paper purporting to be a mortgage, which evidenced plaintiff's title to the property in suit, had not been efficiently executed by the defendant. But, to our minds, there is such a material difference between the facts of that case and this, as that the principle there declared can not be applied here. In both cases, it is true, the alleged maker of the paper was unable to write his name. In that case, however, the payee not only wrote the promisor's name under the obligation, but also made his mark for him; while in this, the agency of the payee, or, more properly, grantee, extended no further than to subscribe the letters constituting the grantor's name, and the latter himself affixed his mark thereto, thus doing not only all the law prescribes in such cases as necessary for him to do, but all that he could possibly do under the circumstances

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toward efficiently signing the instrument. And the subscription thus made was duly attested, and the attestation fully proved on the trial. It is immaterial by whom the name is written; it can not be written by the grantor, nor, standing alone, could it be the signature of the grantor. His signature is his mark, and the requirements of law are fully satisfied, if, finding his name subscribed to an instrument, he set his mark near it. The sole purpose of the name being there at all is by way of identifying and individualizing the mark; and this purpose can be as fully conserved when the name is written, as is by no means unusual in practice, by the other party to the contract, as by a stranger; the act of either in so doing being as purely clerical as writing the body of the paper.

The authorities cited in *Carlisle et al. v. Campbell* all refer to instances where the obligee had acted as the agent of the obligor in the execution of the instrument, the latter being able to write.

The Circuit Court erred, we think, in holding the mortgage offered in evidence not to have been signed by the defendant. Its ruling in that regard is reversed, the nonsuit suffered in consequence of it is set aside, and the cause is remanded.

Reversed and remanded.

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Attachment for Rent by Landlord; Garnishment of Assignee.

1. *Landlord's lien on tenant's goods, for rent of storehouse; garnishment against assignee.*—When a tenant has made an assignment for the benefit of his creditors, the landlord may sue out an attachment to enforce his statutory lien on the goods and effects for the rent of the house in which the tenant lived, or carried on his business (Code, §§ 3069-70), and may summon the assignee by process of garnishment; and he is entitled to a judgment of condemnation for goods and effects remaining unsold in the hands of the garnishee, and also a money judgment for the proceeds of goods sold by him; but not for the proceeds of sale of property to which, though used by the tenant in and about his business, the landlord's lien never extended, nor for money collected for goods sold by the tenant, in the regular course of trade, prior to the assignment.

APPEAL from the City Court of Anniston.
Tried before the Hon. B. F. CASSADY.

[McKleroy v. Cantey & Randolph.]

Attachment by John M. McKleroy, as landlord, against Cantey & Randolph, his tenants, for the rent of a storehouse in Anniston, on the ground that the tenants had made an assignment for the benefit of their creditors; and garnishment against A. P. Agee, the assignee. The court discharged the garnishee on his answer, and this judgment, to which the plaintiff excepted, is here assigned as error. The opinion states the material facts.

J. J. WILLETT, for appellant, cited Code, §§ 3069-70; *Lomax v. LeGrand*, 60 Ala. 537; *Ex parte Barnes*, 84 Ala. 542; *Abraham v. Nicrosi*, 87 Ala. 173; *Weil v. McWhorter*, 94 Ala. 540.

BENJ. MICOU, *contra*, cited *Teague, Barnett & Co. v. LeGrand*, 85 Ala. 493; *Levisohn v. Waganer*, 76 Ala. 412; *Hodges v. Coleman*, 76 Ala. 103; *Goddien v. Pierson*, 42 Ala. 370; *Jones v. Crews*, 64 Ala. 368; *Roby v. Labuzan*, 21 Ala. 60; *Smith v. Ingram*, 90 Ala. 529.

COLEMAN, J.—The defendants, Cantey & Randolph, merchants doing business in Anniston, were indebted to plaintiff for rent of the storehouse in which they conducted their mercantile business. On the 4th of April, 1891, as appears from the answer of the garnishee, the defendants made a general assignment to A. P. Agee, “for the benefit of their creditors, of all their notes, accounts, office furniture, and all effects then unsold, which goods, furniture and effects, were at the time of the assignment in the building in which they were doing business, and for which defendants owed rent.” On the 17th of April, 1891, the plaintiff (McKleroy) sued out an attachment against Cantey & Randolph, to enforce his landlord’s lien, and had process of garnishment served upon the assignee, Agee. The attachment suit was prosecuted to judgment against the defendants in attachment, and the answer of the garnishee not being contested, the court held that plaintiff was not entitled to a judgment against him, and he was discharged. The appeal is prosecuted from the judgment of the court discharging the garnishee.

In addition to the facts stated above, the answer of the garnishee proceeds as follows: “The said garnishee came into the possession, by and under said assignment, of a large number of book accounts against various and sundry persons, living at different places, about \$6,700.00 to \$7,000.00, from which he has collected the sum of \$5,000.00, which he

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now holds; that he also came into possession by said assignment of a mule, which he sold for \$40.00, and a dray which he sold for about \$15.00, and some other articles which he sold, and for which he received the purchase-money; that he went into possession of the storehouse, and that all the effects, &c., came into his possession by virtue of the assignment," &c. He stated, also, that the mule and dray "were used by said defendants in and about their business as merchants;" and that about 600 cheroots, which they had sold, were returned to him.

Section 3069 of the Code declares, "The landlord of any storehouse shall have a lien on the goods, furniture and effects belonging to the tenant, for his rent, which shall be superior to all other liens, except those for taxes." Section 3070, subd. 2, provides that the landlord may enforce his lien by attachment, when the tenant has made an assignment for the benefit of his creditors.

The landlord's lien is declared by the statute. It does not depend for its creation upon distress by the landlord, or the suing out of the attachment. As was held in *Ex parte Barnes*, 84 Ala. 540, the lien is understood to enter into, and is a part of every contract between the landlord and tenant for the lease of a storehouse, and the remedy by attachment is merely a means provided by the statute for the enforcement of the lien. Whoever buys from the tenant goods, furniture or effects, upon which the law fixes the lien, with a knowledge of the existence of the relation of landlord and tenant, is charged with notice of this lien for whatever may be owing from the tenant to his landlord. No assurance of the tenant himself will suffice to invest his vendee with the character of an innocent purchaser, or enable him to hold the property discharged of the lien. Goods sold by a merchant in the usual course of trade are discharged of the lien, for such necessarily, from the character of the business, must be within the understanding of the parties; but goods conveyed by a merchant in payment of an antecedent debt, and purchased solely for the purpose of collecting a debt, is not within the intendment of the parties to the rental contract. As was said in *Weil v. McWhorter*, 94 Ala. 540, "if a dealer casually owes a customer, and the customer has need of his debtor's wares, the satisfaction of such indebtedness by supplying the necessity would be in due course of trade." In such case, the collection of the debt is not the purpose intended by the transaction.

In the case of *Fox v. Jones et al.*, reported in 8 So. Rep. 449, a case decided by the Supreme Court of Florida, the

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contest was between the landlord, seeking to enforce his lien, and the assignee of the tenant, to whom an assignment had been made for the benefit of his creditors. The court held, that the "assignee acquired no greater interest in the goods than the assignor possessed before the assignment," and the assignee took them subject to the landlord's lien; "that the landlord could not be deprived of his lien at the will of the tenant, by assigning the goods in the rented house to a third party." In *Westmoreland v. Foster*, 60 Ala. 455, it was held that, "when the crop had been converted into money, and such money was in the hands of a third person, who had purchased the crop with a knowledge of the lien, then assumpsit for money had and received would lie." See, also, *Thompson v. Merriman*, 15 Ala. 166; *Atkinson v. James*, 10 So. Rep.; *Aderhold v. Bluthenthal*, ante, p. 66. We are clearly of the opinion that, when an assignee of a tenant converts into money "goods, furniture and effects upon which the landlord had a lien at the time of the assignment, and the landlord seeks to enforce his lien by attachment against his tenant, a right given by the statute in cases where the tenant makes a general assignment, such money in the hands of the assignee may be reached by process of garnishment.

The case at bar, in some respects, is unlike the case of *Hodges Bros. v. Coleman & Carroll*. In the latter case, Hodges Bros. were creditors of Jackson & Brother. Jackson & Brother sold their goods to Bruner & Loeb, and Bruner & Loeb sold the goods to Coleman & Carroll. Hodges & Bros. sued out an attachment against Jackson & Brother, and garnished Coleman & Carroll for an alleged balance due on their purchase. Bruner & Loeb were not parties to the suit. Hodges & Brothers were simple creditors without a lien upon the goods. To maintain their action, it was necessary to set aside the sale by Jackson & Brother as fraudulent and void, and yet, to sustain the garnishment process, which sought to reach a balance due on the purchase, it was necessary to maintain the validity of the sale. The balance due from Coleman & Carroll could not be reached as a debt due, except upon the ratification of the sale of the goods to Coleman & Carroll. The court in that case further held, that in no event could the plaintiff proceed to judgment against the garnishees, without notice to Bruner & Loeb, the intermediate purchasers. The principles of law applicable to the facts of that case in this respect do not apply to the facts of the present case.

In the case of *Jones v. Crews*, 64 Ala. 370, relied on by Vol. 95

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appellee, it is said: "There can be only a moneyed judgment against the garnishee, on a debt ascertained to be due from him to the defendant, or a condemnation of chattels in his hands, the property of the defendant, and an order that he deliver them to the sheriff on demand, to be sold in satisfaction of the plaintiff's judgment, not against the garnishee but against the defendant." Construed with reference to the facts in that case, the principle is correct, but must not be taken in a literal sense as absolutely applicable to all cases. One of the issues in the case of *Hodges Bros. v. Coleman & Carroll*, 76 Ala. 103, was, "that the transfer of said stock of goods to said Bruner & Loeb was for the purpose of hindering, delaying and defrauding the creditors of Jackson & Brother, and that Coleman & Carroll (the garnishees) had notice of the same." This court held that, if this averment was found true, then it would have been the duty of the court to render judgment of condemnation, and that the goods be delivered up on demand and sold by the sheriff in satisfaction of plaintiff's claim. Now it is apparent that, as between Jackson & Brother, the attachment debtor, and his vendee or a sub-vendee, the property did not belong to Jackson & Brother. A judgment condemning the property in the hands of Coleman & Carroll, the garnishees, could have been maintained only upon the grounds that it was property liable to plaintiff's claim, and subject to the attachment. So, in the case at bar, the answer of the garnishee admits his possession of property upon which there was the landlord's lien, with a knowledge of the lien, and as to the refrigerator and water-cooler, these effects were sold by him after service of garnishment. If the property had remained in his hands, undisposed of, the court would have enforced the landlord's lien by a sale of the property. Is it permissible for the garnishee, after the attachment is sued out, which is expressly authorized by the statute where an assignment has been made, and the attachment levied by process of garnishment, for the garnishee to defeat the condemnation of the property, and collection of the claim, by converting the property into money? We think not. The statute (Code, § 2978) contemplates the condemnation of property in the possession of the garnishee, and not property which has been sold by him and converted into money. In such case, we must hold that the money, the proceeds of the property which was subject to plaintiff's attachment, in the hands of the garnishee, takes the place of the property, and is sufficient to authorize the rendition of a money judgment against the garnishee.

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The "cheroots" admitted by the garnishee to be in his possession and not sold should have been condemned by the court. We are of opinion that the landlord's lien did not extend to the mule and dray of the defendant debtor. The statute declares the lien upon the "goods, furniture and effects" of the tenant. The word "effects" must be construed in connection with "goods" and "furniture," and refers to property "*ejusdem generis*." Moreover, in *Ex parte Barnes, supra*, it was held that the lien was upon such property only of the tenant as had enjoyed the protection of the leased premises, and not to all the effects of the tenant. This rule was afterwards re-affirmed in *Abraham v. Nicrosi*, 87 Ala. 173, and in *Weil v. McWhorter*, 94 Ala. 540.

We have previously declared that goods sold in the "usual course of trade" were discharged of the lien, and it is evident that the lien is not transferred to the *choses* in action or debts which may be owing for goods legitimately sold by the tenant in the "usual course of trade" on a credit, before the making of the assignment. Money in the hands of the assignee collected by him upon such notes and accounts is not subject to the prior lien of the landlord. Such money in his hands will be paid out in accordance with the terms of the assignment.

For the errors pointed out, the case must be reversed, and the cause remanded.

Nelson v. Larmer.

Action on Promissory Note, by Assignee against Maker.

1. *Trial by court without jury; revision of judgment on appeal*—On appeal from a judgment rendered by the City Court of Anniston, in a case which was submitted to the decision of the court without a jury, this court is required to review the finding of the lower court "without any presumption in favor of the court below on the evidence" (Sess. Acts 1888-9, p. 569, § 12); which means, not that when the record furnishes this court with the *data* for reaching a satisfactory conclusion as to the facts in dispute, the circumstance that a different conclusion was reached by the lower court is not to be permitted to affect the decision on appeal, but that this court is to consider the case as if the evidence set out in the record had been presented to the lower court in just the same way, giving no weight whatever to the fact that the lower court had the witnesses before it, and could observe their manner, demeanor, &c.; yet, on a second trial after a reversal, the evidence being the same as before, it may become the duty of the lower

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court to render the same decision as before, at the risk of a second reversal.

2. *Burden of proof as to payment, in action on note.*—In an action on a promissory note, the only plea being payment, the production of the note makes out a *prima facie* case for the plaintiff; and the evidence as to payment being evenly balanced, he is entitled to a verdict.

APPEAL from the City Court of Anniston.

Tried before the Hon. B. F. CASSADY.

Action by Frank Nelson against S. G. Larmer, founded on defendant's promissory note for \$100, payable to J. S. Blackburn, and indorsed by him to plaintiff. Plea, payment. Trial by court, without jury. Judgment for defendant. Exception and appeal by plaintiff.

KELLY & SMITH, for appellant.

KING & CARTHEL, *contra*.

WALKER, J.—This case was tried in the City Court without a jury. The controlling question in the case is one of fact. The appeal presents for review the finding on testimony given *viva voce*, in the presence of the trial court. The action is on a negotiable promissory note made by the appellee and payable to the order of one Blackburn, who indorsed and delivered it before its maturity to the appellant. The evidence showed without conflict that the appellant received the note in place of a draft for the same amount which had been drawn by Blackburn on the appellee in favor of the appellant, and with the understanding that, if that draft was paid, the note was paid, as it evidenced the same debt. Now, Blackburn had drawn two drafts on the appellee in favor of the appellant, one on November 10th, and the other on November 15th, 1890. The draft of November 10th had been paid; the one of November 15th was not paid. The contention of the appellant was, that the note was received in lieu of the draft which had not been paid. Appellee contended that the note was given in place of the first draft, and as that had been paid the appellant was not entitled to recover on the note which he received with the knowledge and understanding that it evidenced the same debt. Blackburn and the appellant were the only witnesses as to the agreement under which the note was delivered by the former to the latter. Their testimony is in direct conflict. The appellant's version supports his own contention in the case. Blackburn's testimony as fully sustains the position of the appellee. We are unable to dis-

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cover any uncontroverted fact in the case which proves the truth of the testimony of one of these two witnesses, or discredits that of the other. The fact that the note was given after the first draft had really been paid raises no presumption that it was transferred in place of the second draft; for, according to the testimony of appellee's witnesses, the maker of the note did not himself know that his banker had paid the first draft, and Blackburn did not know that it had been paid. The result of the case depends upon which of the two conflicting versions of the disputed transaction is to be credited.

Under the provision of the "act to establish the City Court of Anniston," we are required to review the finding of that court on the evidence, when properly presented, "without any presumption in favor of the court below on the evidence."—Acts of Ala. 1888-89, p. 569, § 12. This provision displaces the rule, which would prevail in the absence of it, that a finding of fact by the trial court, acting without a jury, on the oral testimony of witnesses who are examined in its presence, when the law authorizes the disputed question of fact to be tried in that mode, should not be reversed on appeal, unless it is so manifestly against the evidence that a judge at *nisi prius* would set aside the verdict of a jury, rendered on the same testimony.—*Nooe v. Garner*, 70 Ala. 443; *Cobb v. Malone*, 92 Ala. 635.

It appears to the writer that the provision of the statute against indulging any presumption in favor of the finding of the trial court could not have been intended to mean any more than this, that if the record furnishes the revising tribunal with the *data* for reaching a satisfactory conclusion as to the facts in dispute, the circumstance that a different conclusion was reached by the lower court is not to be permitted to affect the result on appeal. When, however, the conclusion to be reached from the evidence must be determined by circumstances which could be given their due weight by the trial court, but which are not, and can not be disclosed by the record, then the finding of the trial court must be treated as correct, as the means of reaching a satisfactory conclusion to the contrary are not available on appeal. Such is the case when the evidence as to a disputed fact is the testimony of two witnesses who directly contradict each other, and the other evidence in the case no more corroborates the statements of one than of the other. Such conflicting statements, when reduced to writing, seem to balance each other. But one who has the advantage of seeing the witnesses as they deliver their testimony may be

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fully justified in crediting the statements of the one, and rejecting those of the other as unworthy of belief. The weight to be given to oral testimony largely depends upon whether the appearance and general bearing of the witness beget confidence or mistrust. When the evidence in the case is in such conflict, and is so evenly balanced, that the conclusion to be reached would naturally depend upon the impressions made by the several witnesses on one who saw and heard them testify, it seems to the writer that the revisory court, which is denied the opportunity of giving due weight to such considerations, should abstain from disturbing the finding of the primary court, as the record does not satisfactorily show that its conclusion on the evidence was wrong.

The other members of the court, however, are of opinion that, under the statute in question, we are not permitted to give any weight at all to the circumstance that the trial court had the advantage of testing the value of the statements of the several witnesses by observing their appearance, their demeanor on the stand, and their manner of delivering their testimony; and that we must consider the evidence as reduced to writing and presented in the record, just as if it had been presented to the trial court in the same way. Under this construction of the statute, it can not be denied that the appellate court, in coming to a different conclusion on the evidence as presented in the record from that reached by the trial court, with the witnesses in person before it, must often do so when it is fully conscious that in all probability the conclusion of the trial court was right. It is not the fault of the court that valid legislation may lead to such unreasonable results. It is the province of the legislature to provide against such evils. In giving to the statute a construction involving such results I have reluctantly yielded my views to those of the other members of the court.

In the present case, the proof of the note made out a *prima facie* case for the plaintiff. The defendant relying on payment, the burden was on him to prove this affirmative defense. The evidence standing evenly balanced, as above noted, on this turning issue in the case, we are unable to arrive at a satisfactory conclusion from the record that the defendant has discharged the burden upon him. The result is that the judgment of the City Court must be reversed.

If the case is tried again on the same evidence, the judge of the City Court may be fully justified and, indeed, in duty bound by the impression made upon him by the witnesses

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testifying in his presence, to accept as true the version given by the plaintiff's witness of the matter in controversy. A mere dread of a reversal should not deter him from resting his conclusion on the testimony which he believes to be true. And yet, when the testimony is again reduced to writing, and presented here for review, the operation of the statute might again force this court to a reversal. It is possible, in such circumstances, that justifiable findings by the trial judge, and unavoidable reversals here, may be indefinitely repeated. It is fair to presume that the legislature, in enacting the provision in question, overlooked the possibility that its practical operation might lead to such a round of absurdities.

Reversed and remanded.

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Trover by Administrator, for Conversion of Cotton.

1. *When administrator may maintain action.*—The intestate having died in August, leaving a crop of cotton in the field ungathered and still growing, which was afterwards gathered and sold by one of his sons, the bales being marked in the name of the intestate; an administrator subsequently appointed may maintain trover against the purchaser, who, when he bought the cotton, knew that the intestate was dead, and that no administration had been granted on his estate.

APPEAL from the Circuit Court of Perry.
Tried before the Hon. JOHN MOORE.

PITTS & HARWOOD, G. B. JOHNSTON, and E. W. PETTUS, for appellant, cited *Blair v. Murphy*, 81 Ala. 454.

JNO. T. VARY, and J. H. STEWART, *contra*, cited *Upchurch v. Norsworthy*, 15 Ala. 709; *Abernathy v. Bankhead*, 71 Ala. 193; *Carpenter v. Going*, 20 Ala. 587; *Mitcham v. Moore*, 73 Ala. 542; *Loeb v. Richardson*, 74 Ala. 311; *Tayloe v. Bush*, 75 Ala. 432.

STONE, C. J.—M. F. C. Weaver lived on a plantation and cultivated a crop of cotton thereon in 1889. He died, intestate, August 17, 1889. At that time the cultivation of the crop was practically completed, but its growth had not ceased. It was in the fields, and ungathered. Most of these

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facts are shown in the testimony. The others are common knowledge. The sons of deceased—one of them residing on the plantation, but on another part of it—then gathered the cotton, and sold it to the appellant, Marx. This sale was in August, 1889. The bales of cotton were branded in the name of the deceased, and at the time of the purchase appellant knew that M. F. C. Weaver was dead, and that no administration had been granted on his estate. Appellant resold the cotton in September, 1889. This is the alleged conversion for which this action was brought. No proof was made of the expense, or value of the labor incurred or employed in gathering the cotton and preparing it for the market, and no ruling was invoked bearing on this question. If there be anything in it—upon which we decide nothing—the record fails to bring it before us for consideration.

On November 4, 1889, Nelms was appointed administrator of the estate of M. F. C. Weaver, deceased, and brought this action against appellant for the conversion of the cotton. The court, on written request, gave the general charge that, "If the jury believe the evidence, they must find the issue in favor of plaintiff." This ruling furnishes the subject of the chief assignment of error.

The case of *Blair v. Murphy*, 81 Ala. 454, is relied on by appellant in support of this assignment of error. The facts of that case were materially different from those found in the record before us, and that case was decided mainly on the exceptional facts it presented. Even with this explanation, the contention is plausible, that some of the expressions found in that opinion tend to mislead, if they do not invade the domain of a well recognized principle, which is essential to the maintenance of creditors' rights in estates of decedents. We there decided that the word *may*, in section 2098 of the Code of 1886, does not impose on the personal representative the imperative duty of completing every crop the decedent may leave growing at the time of his death, irrespective of any prospect of profit to be derived from its completion. We held that the statute left him a discretion, to be exercised in the interest of the estate. We adhere to that conclusion, but hold it has no proper application to the case in hand.

When Mr. Weaver died—August 17—the cultivation of the crop was practically completed. There remained to be bestowed only the labor of gathering and preparing it for market. If an administrator previously appointed had neglected this duty, and had permitted a crop thus circumstanced to perish in the field, he would have been guilty of

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a *devastavit*, and would have been chargeable therefor. The presumption is that he would have done his duty, and would have harvested the crop for the benefit of the estate. Coming later into the trust, and his right of property dating from the death of his intestate, we must accord to him all the legal rights a performance of these plain duties would have secured to him. Possibly, in claiming the crop after it was harvested, the duty would be assumed by him to compensate any labor and expense that had been incurred in gathering it. This question, as we have said, is not before us, and we do not decide it.

The case in hand is not distinguishable in principle or material facts from many heretofore decided in this court, in which we held the plaintiff was entitled to recover. The Circuit Court did not err in the charge given.—*Upchurch v. Norsworthy*, 15 Ala. 705; *Carpenter v. Going*, 20 Ala. 587; *Abernathy v. Bankhead*, 71 Ala. 190; *Mitchum v. Moore*, 73 Ala. 542; *Loeb v. Richardson*, 74 Ala. 311; *Taylor v. Bush*, 75 Ala. 432.

There is nothing in the other exceptions reserved.
Affirmed.

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Trial of Right of Property in Chancery Court.

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1. *Burden of proof; possession as evidence of ownership.*—On the trial of a statutory claim suit, the *onus* is on the plaintiff in execution, in the first instance, to prove the defendant's ownership of the property at the time of the levy; but this burden being discharged by proof of his possession at that time, which is presumptive evidence of ownership, the *onus* then devolves on the claimant to establish his ownership at that time.

2. *Proof of wife's ownership of property, as against execution creditor of husband.*—When the wife interposes a statutory claim to property on which an execution against her husband has been levied, and which is shown to have been in his possession at the time of the levy, her ownership is not sufficiently established by the testimony of her husband alone, who fails to disclose, in answer to special interrogatories, how, when or from whom she acquired the money with which to make the alleged purchases from himself and others, and whose testimony is in other particulars suspicious, improbable, and unsatisfactory, the wife herself not testifying.

3. *Assessing separate value of property; amendment of judgment.*—On the trial of a statutory claim suit, whether the issue is submitted to a jury or to the court (Code, § 3007), the judgment must show that the

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alternate value of the several articles of property was assessed; but the failure to do so, when the issue was submitted to the court for decision, and the record clearly shows the alternate value of the property, is an irregularity which this court will correct, and will affirm the judgment as corrected.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. THOMAS COBBS.

J. E. BROWN, for appellant.

WM. L. MARTIN, *contra*.

McCLELLAN, J.—This appeal is from a decree of the Chancery Court subjecting certain property to the satisfaction of an execution issued out of that court in favor of Oehmig & Wiehl, and levied thereon as the property of N. W. Vaught, defendant in execution. Mrs. E. J. Vaught interposed a statutory claim to the property, and on this an issue was made up and submitted to the court for decision, resulting in the decree now complained of.

The *onus* which rested on the plaintiffs in execution, to make out in the first instance a *prima facie* case of ownership in the defendant, N. W. Vaught, at the time of the levy, was discharged by proof that the property was then in his possession.—*Jackson v. Bain*, 74 Ala. 328; *Wollner & Lowenstein v. Lehman, Durr & Co.*, 85 Ala. 274; *Jones v. Franklin*, 81 Ala. 161. The burden then shifted to the claimant, Mrs. Vaught, to overcome the *prima facie* presumption of ownership in the defendant, and to prove ownership in herself. This was attempted to be done solely by the testimony of N. W. Vaught, the defendant, who is the husband of the claimant. Mrs. Vaught was not examined at all.

We concur with the chancellor that the evidence adduced is insufficient to support the claim. As to a part of the property it is, in effect, that the defendant sold it to his wife for cash paid at the time; and yet he swears, soon after this alleged sale and receipt of the purchase-money by him, that he had nothing whatever except his wearing-apparel. As to another part of the property, he says his wife purchased it from several named persons, and took receipts for the purchase-money, which is itself a rather unusual and suspicious circumstance, somewhat intensified here by the fact that these several receipts are attached as exhibits to his deposition without being called for by the interrogatories; but he fails to state, in answer to a specific question, who paid the money on these several purchases,

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thus opening his evidence to the construction that he himself paid it. Yet other items of the property, he swears, were acquired by his wife in exchange for other property owned by her. But this evidence wholly fails to disclose the sources from which Mrs. Vaught came by the means with which to purchase the property levied on, or property exchanged for some of that levied on, or other property which he says she owned, or that she ever in fact, at any time, had the money with which to purchase the property which he says now belongs to her. And this omission was not due to an absence of effort on his part to show her pecuniary ability to acquire the property. On the contrary, his attention was specially invited to that matter, and he was, on cross-examination, particularly interrogated in regard to it. His answers to these questions disclose that his wife had only \$75.00 at the time of their marriage; that he had given her since then only about \$400.00, and that she now claims to own property worth about \$2,000. Nothing is said as to any investment or use of the \$475, from which profits had swelled it to the much larger equivalent of this property. This failure to show Mrs. Vaught's ability to buy and own the property, taken in connection with the failure to examine the claimant herself, who presumably could have put this matter in a clear light, if in fact she had purchased it; the admitted insolvency of the defendant; the fact that all the property levied on was, and had all along been, in his possession and use, and the unusual and suspicious particularity as to the receipts before referred to, force us to the conclusion that the claimant has failed to discharge the burden resting on her to establish her ownership of the property she claims.

The decree, however, fails to assess the alternate value of the property involved. The record before us clearly shows the value of the property levied on as follows: 1 wagon, \$50.00; 1 spring-wagon, \$60.00; 1 buggy, \$40.00; 2 sets buggy-harness, \$15.00; 2 saddles, \$12.00; 1 small bay horse name Bob, \$60.00; bay horse "Tom," \$50.00; large bay horse "Dexter," \$25.00; black horse Jim, \$50.00; black horse "Texas," \$50.00; and 1 horse named "Old Charley," \$30; and a decree will be here entered for the alternate value of the several items of property accordingly. As thus modified, the decree is affirmed.

[Morrison v. Morrison.]

96 309
137 71**Morrison v. Morrison.***Bill in Equity for Divorce.*

1. *Proof of adultery, as ground of divorce.*—To authorize a divorce on the ground of adultery, the circumstances proved "must be such as would lead the guarded discretion of a just and reasonable man to the conclusion that the act has been committed;" and applying this rule to the evidence in this case, which the court states, it is held sufficient to establish the charge of adultery on the part of the wife, notwithstanding the direct denials of herself and her alleged paramour.

APPEAL from the Chancery Court of Bibb.
Heard before the Hon. WM. H. TAYLOR.

LOGAN, HARGROVE & VAN DE GRAAFF, for appellant, cited *Jeter v. Jeter*, 36 Ala. 391; *Mosser v. Mosser*, 29 Ala. 313; *Powell v. Powell*, 80 Ala. 595; *Richardson v. Richardson*, 4 Porter, 467; Bishop on Marriage & Divorce, §§ 429, 431, 452, 425, 277, 285-88.

COLEMAN, J.—The complainant filed his bill against his wife, the respondent, praying that the bonds of matrimony be cancelled and annulled, and that he be divorced. The bill charges adultery with one Robert Brewer. The respondent answered, denying the charge of adultery, and by cross-bill asked to be divorced from her husband, the complainant in the original bill. At the hearing, the court refused relief to either, and dismissed both the original and the cross-bill. The complainant in the original bill appeals, and assigns the decree as error.

We agree with the chancellor, that there is no proof to sustain the cross-bill; and that it was properly dismissed. In regard to the original bill, the learned chancellor seems to have considered only the evidence of the husband, the plaintiff, and of the wife, the defendant, and Robert Brewer, the party with whom, as alleged in the bill, the adultery was committed. That there was a difficulty between husband and wife, growing out of the fact that the husband accused her and Brewer of being too intimate, is not controverted, and separation of the husband and wife followed. That the wife left, and for a while lived at Henry Carroll's,

[Morrison v. Morrison.]

are undisputed facts. Both Henry Carroll and his wife testified that Robert Brewer visited her at their house; that he was seen to kiss her, and said he could kiss and hug her now as much as he pleased; and on two different nights he went into her room, closed the door, and remained in there with her alone, one night until after eleven o'clock; and the other night they did not know when he left her room. Robert Brewer was notified by the owner of the house not to repeat his visits; and in response to this notice, the defendant stated that, when she "got a house of her own, she would do as she pleased, and that she would not go back on Robert Brewer." The criminating facts here testified to are not denied or questioned either by the defendant herself or Robert Brewer, further than may be included in their general denial of having had illicit intercourse.

The evidence by numbers of witnesses, and which is neither denied nor explained, is that the respondent soon afterwards left the house of Henry Carroll, and for twelve months lived with Robert Brewer in a house having two rooms, with no shutter between the two rooms. The witnesses all state that, while here, they lived together as man and wife. A part of the time they thus lived together was after the filing of the bill, but such testimony, when properly connected, is admissible to show a previous adulterous intercourse.—*Alsobrooks v. State*, 52 Ala. 24; *Lawson v. State*, 20 Ala. 74; *Smitherman v. State*, 40 Ala. 355.

The record abounds with other evidence of a criminating character, wholly inconsistent with the innocence of respondent and Brewer, unless we impute to them a frigidity of temperament, or an ethical affection, not common to human nature. The facts do not warrant the assumption that these parties were abnormally virtuous. The rule in cases of fornication or adultery is, "that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion" that the act has been committed. Applying this rule to the evidence in the case, we are very clear that the court below erred in dismissing complainant's bill.

A decree will be here rendered granting the complainant the relief prayed for in his bill of complaint.

Reversed and rendered.

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[Smith v. Dick.]

Smith v. Dick.*Appeal Case from Justice's Court.*

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114	694
95	311
148	288

1. *Sufficiency of statement, or complaint.*—In a case commenced in a justice's court, a statement or complaint, claiming "\$100 for a mule that plaintiff sold to defendant," shows a substantial cause of action, and is sufficiently definite and certain.

2. *Specification of grounds of demurrer; presumption in favor of judgment.*—When a demurrer is sustained to a plea, but the grounds of demurrer, if any were specified, are not shown by the record, the ruling will be affirmed, if the plea is demurrable for any cause.

3. *Plea to complaint, good only as to one count.*—A plea to the whole complaint, good only as to one of the counts thereof, is demurrable on that account.

4. *Judgment for more than amount claimed.*—If the complaint contains a substantial cause of action, but judgment is rendered for more than the amount claimed in the complaint, with interest thereon, the irregularity not being objected to in the court below, where it might have been remedied (Code, § 2835), it is not available on error.

APPEAL from the Circuit Court of Lee.

Tried before the Hon. JESSE M. CARMICHAEL.

There is no bill of exceptions in this case, and the record is very defective. The action was commenced by a summons issued March 9, 1889, by "*J. T. Norman, ex off. J. P.*," entitled "*N. P. Court, Beat No. 2*," directed "to any sheriff of Lee county," and commanding him to "summon *A. J. Smith & Co.*, to appear at the next term of the N. P. Court to be held for Beat No. 2," to answer the complaint of *C. W. Dick*. The accompanying complaint, or statement of the cause of action, entitled *C. W. Dick v. A. J. Smith*, was in these words: "Plaintiff claims of defendant the sum of \$100 due by account stated before the commencement of this suit, to-wit, on the — day of February, 1888. Plaintiff claims of defendant, also, \$100 dollars for a mule that plaintiff sold to defendant." The record does not show any of the proceedings had in the justice's court.

In the Circuit Court, on the 7th May, 1890, the defendant filed a demurrer to the complaint, as follows: to the first count, "because it does not aver the date on which the account therein alleged was stated;" and to the second count, (1) "because it fails to aver or show in what manner defendant is liable in the sum claimed for a mule;" (2) "because it fails to aver that plaintiff sold said mule to

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defendants for the sum claimed;" (3) "because it does not show that defendants are liable in the sum claimed for the mule mentioned in said count." On the same day, the defendant filed several pleas, which, as copied in the transcript, are numbered 2, 3, 4, 5; and another plea, not numbered, was filed on the 29th April, 1891, on which day a judgment was entered as follows: "Plaintiff has leave to amend first count of complaint, and demurrer to said count overruled; and defendants demurred to second count of complaint, as shown by the record, which, being considered by the court, was overruled. Defendant, by leave of the court, amended pleas numbered one and four, as shown by the record. Plaintiff demurred to defendant's plea No. 4 as amended, which, being considered by the court, was sustained, and overruled as to the other pleas. Both parties having announced ready for trial, came a jury," &c., who returned a verdict for plaintiff, assessing his damages at \$124; and the court rendered judgment for that amount. No other facts are shown by the record.

The errors assigned are: (1) the overruling of the demurrer to the second count of the complaint; (2) the overruling of the demurrer to the fourth plea; (3) the rendition of judgment for \$124.

JNO. M. CHILTON, and S. O. HOUSTON, for appellant.

T. L. KENNEDY, *contra*.

WALKER, J.—1. The second count of the complaint follows substantially one of the Code forms for the common counts, the claim being for "one hundred dollars for a mule that plaintiff sold to the defendant." In one of the Code forms the language is, "for merchandise, goods and chattels sold by the plaintiff to the defendant," &c.—Code of 1886, p. 792. "The declaration or statement, in case of appeal from a justice of the peace, is not subject to the technical rules of pleading. If it shows in general terms a debt due, or contract to be performed and a breach, it is sufficient." 1 Brick. Dig., 114, § 77; *Western Union Tel. Co. v. Meyer*, 61 Ala. 158. Certainly, the second count of the complaint in this case conformed to this requirement, and the demurrer thereto was properly overruled.

2-3. The demurrer to the fourth plea is not copied into the record. When the grounds of the demurrer do not appear, on the presumption in favor of the ruling of the primary court, its action in sustaining the demurrer will
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be affirmed, if there be any sufficient cause of demurrer. *Sessions v. Boykin*, 78 Ala. 328. The fourth plea was not an appropriate answer to the whole complaint. It was not so framed as to apply to the cause of action stated in the second count.

4. It is assigned as error that the judgment was for more than the amount claimed in the complaint, with interest thereon. The judgment was for the amount found by the verdict. The objection now urged was not made in the lower court. It can not be made on appeal for the first time. The remedy in such case is by motion for a new trial in the court below, where the error may be cured by a release of the excess, or such other order made as the justice of the case may require. As the complaint contains a substantial cause of action, the judgment can not be set aside for a matter not previously objected to.—Code, § 2835; *Rich v. Thornton*, 65 Ala. 310; *Government Street R. R. Co. v. Hanlon*, 53 Ala. 70.

Affirmed.

Hendrix v. American Freehold Land Mortgage Co.

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107	640
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96	313
129	607

Bill in Equity by Mortgagee, after Purchase at Sale under Power, for Injunction and Receiver.

1. *Mortgagee's right, after purchase at sale under power, to injunction and receiver in aid of ejectment; appointment of receiver without notice.* A mortgagee of lands, having become the purchaser at a sale under the power, but without express authority conferred by the mortgage, and having brought ejectment to recover the possession of the land, may come into equity for an injunction to prevent the mortgagor and a person holding under him by fraudulent conveyance from disposing of the crops, and for a receiver to take possession, gather and hold the crops, on averment that the land is not worth the amount of the mortgage debt, that the defendants are insolvent, and that they have removed and disposed of part of the crops; and a receiver may be appointed without notice, complainant being required to execute a proper bond.

APPEAL from the Chancery Court of Limestone.
Heard before the Hon. THOMAS COBBS.

R. A. McCLELLAN, for appellants cited High on Receivers,

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555; 38 Ala. 338; 55 Ala. 631; 56 Ala. 211; 52 Ala. 220; 87 Ala. 331, 734; 89 Ala. 217.

HUMES & SHEFFEY, *contra*, cited *English v. Key*, 39 Ala. 113; *Tubb v. Fort*, 58 Ala. 279; *Westmoreland v. Foster*, 60 Ala. 448; *Coffey v. Hunt*, 75 Ala. 236; *Kirkpatrick v. Boyd*, 90 Ala. 449; *Ashurst v. Lehman, Durr & Co.*, 86 Ala. 370; *American Freehold Mortgage Co. v. Sewell*, 92 Ala. 163; *Comer v. Shehan*, 74 Ala. 452; *Beach on Receivers*, § 494.

THORINGTON, J.—Irie L. Hendrix, one of the appellants, executed a mortgage on the 23d day of December, 1887, in favor of appellee, to secure a loan of money made contemporaneously with the execution of the mortgage; said mortgage containing the usual stipulations found in mortgages taken by foreign loan companies, and among others a power of sale on default in payment of the interest and principal notes described in the mortgage, but containing no provision authorizing the mortgagee to purchase the property at any sale that might be made under the power.

The mortgage matured December 22, 1890, and there was default in the payment of both principal and interest; and thereupon appellee filed its bill in the Chancery Court for Limestone county, the county in which the mortgaged lands are situated, alleging the execution of the mortgage as above stated, the default in the payment of the mortgage debt at maturity, and that appellee had sold the property pursuant to the power of sale, and had become the purchaser at such foreclosure sale. The bill further alleges that, after the execution of the mortgage, the mortgagor sold the mortgaged property to his father, J. M. Hendrix, and placed the latter in possession thereof, and that the mortgagor then removed to Jefferson county, where he was residing when the bill was filed; that said sale was not *bona fide*, but was made for the purpose of hindering, delaying and defrauding appellee "out of its just rights, and out of the rents and profits of said lands, and that defendants combined and confederated thus to hinder, delay and defraud your orator, and prevent it from collecting the rents accruing on said place." It is also averred in the bill that, on September 24th, 1891, appellee demanded of said J. M. Hendrix, who was then, and also at the time of filing the bill, in possession of the land, that he deliver possession thereof to appellee, and that he attorn to and recognize it as his landlord; and that said J. M. Hendrix refused to deliver up

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possession, or to attorn to appellee, and denied appellee's right to possession of the property.

It is further shown by the bill that the property was insufficient to satisfy the mortgage debt; that although it was bid in by appellee at the sale under the mortgage, for as much as it was reasonably and fairly worth, there still remained unsatisfied, of the mortgage debt, about two hundred dollars. It is also averred that both Irie L. Hendrix and J. M. Hendrix are insolvent, and that the latter had removed from the lands a portion of the crop without appellee's knowledge or consent, and that the rent was in danger of being lost to appellee, who became entitled thereto by reason of its purchase at said mortgage sale, and that said crops, unless the court should interfere by the appointment of a receiver, would be gathered and disposed of by appellants, and wholly lost to appellee.

The bill further shows compliance by complainant with the laws of this State as to the appointment of an agent and having a well known place of business here, and also alleges that its charter confers on it the power to make loans in this country secured by mortgages on lands. The bill further alleges that appellee, on the 17th day of October, 1891, instituted suit in the Circuit Court of Limestone county for the recovery of the possession of the lands from the appellants.

The bill makes both Irie L. and J. M. Hendrix parties defendant, prays for an injunction, and for a receiver to take charge of, gather and sell the crop, and also prays for general relief, and is sworn to by S. J. Felder, who is stated in the affidavit to be the agent of appellee, and as such authorized to make the affidavit. A copy of the mortgage is attached to the bill as an exhibit, and the bill was filed in said Chancery Court of Limestone county on the 17th day of October, 1891.

On the same day the bill was filed, without notice to either of the defendants to the bill, and before answers filed, an application was made to the chancellor for the appointment of a receiver. The chancellor granted the application, and appointed a receiver, but required appellee first to enter into bond with sureties to be approved by the register, in the sum of two hundred dollars, with condition to pay appellants such damages as they, or either of them, might sustain by reason of the wrongful appointment of a receiver. The appeal is from the order of the chancellor appointing a receiver, and the questions raised by the assignments of error and briefs of counsel are, whether the aver-

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ments of the bill make out a case which authorizes appellee to come into a court of equity for the appointment of a receiver, instead of proceeding at law; and if the bill can be maintained for such purpose, whether the facts therein alleged are sufficient to justify the action of the chancellor in dispensing with notice to appellants of the application for the appointment of a receiver.

We have set forth the averments of the bill at much length, for the reason that the appointment of the receiver was made on the sworn statements of the bill alone, there being no affidavits or other proof offered on the motion; and also for the purpose of showing that the facts of the case bring it clearly within the influence of the decision of this court in the cases of the *Freehold Land Mortgage Company of London v. Daniel H. Turner et al.*, and *American Freehold Land Mortgage Company of London v. Peter Simmons et al.*, decided together at the present term, *ante*, pp. 272-8. On the authority of that decision it must be held, that the uncontroverted statements of the bill in this case show that appellee has not a full and adequate remedy at law, and that it is a proper case for the interposition of a court of equity by the appointment of a receiver in aid of the action of ejectment which was being prosecuted by appellee in the court of law.

It is equally clear that, on the uncontroverted case made by the bill, and former decisions of this court, the chancellor was justified in appointing a receiver on the *ex-parte* application of the complainant in the bill. Section 3534 of the Code, which requires notice to be given of applications for the appointment of receivers, also authorizes such notice to be dispensed with on good reason shown to the chancellor or register for the failure to give such notice. It is here shown that one of the defendants resided out of the county in which the bill was filed; that both defendants were insolvent; that they had conspired together to defraud appellee out of the crops by gathering and disposing of the same; that part of the crop had been gathered and disposed of, and that there was danger of the entire crop being so lost to appellee. The receivership extended only to the crop, and appellants were fully protected by the bond appellee was required to give, and did give, before the appointment of the receiver was made.

In the case of *Ashurst v. Lehman, Durr & Co.*, 86 Ala. 370, it is said: "Considering the nature and character of the subject-matter of controversy, the facility with which the crops may be disposed of, their liability to waste or des-

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truction, the necessity of their preservation and application to the mortgage debt, the insolvency of defendant, and his application of a part of the crop in disregard of the rights of complainants, we are of the opinion that the bill makes a *prima facie* case for the appointment of a receiver, and shows a good reason for its failure to give notice of the application."

In the following cases, also, the appointment of a receiver without notice was sustained by this court on facts showing no greater urgency than is shown by the bill in this case: *Heard v. Murray*, 92 Ala. 127; *Sims v. Adams*, 78 Ala. 395.

The case of *Dollins & Co. v. Lindsey & Co.*, 89 Ala. 217, relied on by appellant, clearly recognizes the necessity and legality of appointments of receivers without notice on good reason being shown, but reversed the order made in that case because the affidavits of fact and urgency were not sufficient, and also because no bond was given by the parties at whose instance the receiver was appointed, to indemnify the defendant in the event the appointment should prove wrongful. And in the case of *Thompson v. Tower Manufacturing Company*, 87 Ala. 733, another case cited by appellee, the defendant in possession of the property which the bill sought to have placed in possession of a receiver, was not shown to be insolvent, and while this court reversed the order appointing the receiver, it was said: "If it had been shown that Mrs. Thompson was insolvent, we will not say what would have been our ruling." In the case of *Crowder, Newman et al. v. Moore*, 52 Ala. 220, also cited by appellee, the order appointing the receiver was vacated by this court, because it was made before the bill had been filed. It is said in that case: "As a general rule, such notice is necessary; but the rule is subject to exceptions in special cases where irreparable injury would be sustained by the delay."

The case under consideration meets all the conditions wanting in the three last cited cases, and which, it was held, in them, would have justified the failure to give notice. Here, a bond of indemnity was given; it is shown that the defendants are insolvent, and that irreparable injury would result from delay.

There was no error in the decree of the Chancery Court appointing the receiver without notice, and the same is accordingly affirmed.

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Dundee Mortgage & Trust Investment Co. v. Nixon.

Action by Foreign Corporation, on Promissory Note.

1. *Facts averred or shown by pleading of opposite party.*—Facts which are averred in the complaint need not be pleaded in defense, or, if set up in a plea, as a general rule, need not be proved by the plaintiff. So far as the rights of the plaintiff are concerned, the defendant may consider facts averred in the complaint to be true.

2. *Heading of note, as showing place of execution.*—When a promissory note, in its heading, is dated at "Uniontown, Alabama," the presumption is that it was executed there; and this presumption must prevail, in an action on the note, in the absence of evidence to the contrary.

3. *Issue on defective plea.*—When issue is joined upon a defective plea, and the evidence sustains it, the defendant has the right to have the court charge the jury upon such plea.

4. *Specification of grounds of demurrer; presumption in favor of judgment.*—When a demurrer to a plea is overruled, and the record does not show what grounds of demurrer, if any, were specified (Code, § 2890), this court will presume that none were specified, or that those specified were insufficient; and will not consider the sufficiency of the plea.

5. *Nonsuit with bill of exceptions.*—A statutory nonsuit with a bill of exceptions to a charge of the court to the jury is revisable in this court (Code, § 2759), but a nonsuit in consequence of rulings on the pleadings is not; and when the judgment-entry recites that the nonsuit was taken in consequence of both rulings, this court will consider only the correctness of the charge to the jury.

6. *Foreign corporations doing business here; constitutional and statutory restrictions.*—The constitutional and statutory restrictions imposed on foreign corporations doing business in Alabama do not apply to every act done by such corporations here, but do apply to a loan of money here by a foreign corporation engaged in the business of lending money on mortgage, and prevent a recovery by the corporation on a note given for the money borrowed, when a failure to comply with those provisions is shown.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. WM. E. CLARKE.

This action was brought by the appellant, described in the summons and complaint as "a corporation under the laws of Great Britain," against Wm. G. Nixon, J. W. Bush and W. M. Bush; and was commenced on the 24th April, 1888. The action was founded on the defendants' writing obligatory, or promissory note under seal, for \$1,700, which was dated "Uniontown, Ala., May 28th, 1887," and payable November 1st, 1887, "to the order of Francis, Smith, Cald-

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well & Co., for the use of Dundee Mortgage & Trust Investment Company, Limited," and it contained a waiver of exemptions. The defendants filed seven pleas, "in short by consent," namely: (1) *nil debet*; (2) payment; (3) usury; (4) want of consideration, because, as stated, the note was given for a past-due debt of said Nixon without any new consideration; (5) that the note was executed in Alabama, that the plaintiff was at that time a foreign corporation, and was not legally authorized to transact business in Alabama, not having complied with constitutional and statutory provisions; (6) that when the writing sued on was executed, plaintiff was a foreign corporation, and had not filed in the proper office an instrument of writing designating an authorized agent and a known place of business in this State; (7) that plaintiff was a foreign corporation at the time the writing sued on was executed, and had no known place of business in Alabama, and no authorized agent here, and that the note sued on was executed in Alabama.

Demurrers seem to have been filed to each of these pleas, but the record only shows the grounds of demurrer assigned to the 4th plea. The defendants afterwards asked leave to withdraw their pleas, and filed a demurrer to the complaint; which demurrer being overruled, defendants refiled their former pleas, and the plaintiff demurred to them. The court sustained the demurrer to the fourth plea, and overruled it as to the others; and issue was then joined on all of them.

On the trial, the plaintiff offered in evidence the note, or bond, on which the action was founded, and it was admitted without objection; and the defendants then proved that, "at and up to the date of said note," plaintiff had not complied with the statutory provisions regulating the right of foreign corporations to do business in this State. This being "all the evidence in the case," the court charged the jury, on request, to find for the defendants if they believed the evidence. The plaintiff excepted to this charge, and, as the bill of exceptions recites, thereupon "took a nonsuit, and reserved the point for the determination of the Supreme Court;" but the judgment-entry recites that the plaintiff excepted "to the overruling of the demurrer to the pleas, and also to the charge of the court, and, by consent of the court, takes a nonsuit with a bill of exceptions."

The errors assigned are, the overruling of the demurrers to the pleas, and the charge of the court to the jury. The appellees submitted a motion to strike out the first assignment.

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GEO. B. JOHNSTON, for appellant.—(1.) Only one plea was sustained by the evidence, and it presented an immaterial issue. (2.) The 5th, 6th and 7th pleas were each insufficient, because they did not aver that plaintiff was a foreign corporation, and that the note sued on was taken by it in the conduct of some of its business, without a compliance with statutory provisions. (3.) The note itself made out a *prima facie* case for plaintiff, and imposed on defendants the *onus* of proving that it was taken in violation of law in the transaction by plaintiff of its business in this State; but no such proof was offered. The note is not payable to plaintiff, but to third persons for its use; and there is no proof as to its consideration, or the circumstances under which it was executed. It may have been given in payment of an antecedent debt. In the absence of proof that the note was taken by plaintiff in the transaction of its business in this State, defendants were not entitled to the general charge on the evidence.—*Beard v. Publishing Co.*, 71 Ala. 60; *Farrior v. N. E. Mortgage Co.*, 88 Ala. 275; *Peeples v. Texas*, 23 N. Y. 242; 8 Abb. Pr. (N. Y.) 427; 18 A. & E. Corp. Cases, 178; 29 Fed. Rep. 17, 38; *Christian v. Amer. Freehold Mort. Co.*, 89 Ala. 198.

WATTS & SON, and JOHN C. ANDERSON, *contra*.—(1.) The rulings on demurrer are not revisable, and the assignments of error founded on them should be stricken out.—*Vincent v. Rogers*, 30 Ala. 471; *Durden v. James*, 48 Ala. 33; *Wyatt v. Evins*, 52 Ala. 285; *Perry v. Danner & Co.*, 74 Ala. 485. (2.) If the evidence sustained any one of the pleas, though defective, the defendant was entitled to a charge on its effect.—*Masterson v. Gibson*, 56 Ala. 56; *Mudge v. Treat*, 57 Ala. 1; *Ex parte Pearce*, 80 Ala. 195; 89 Ala. 625. (3.) The note showed on its face that it was made in Alabama, and it was proved that plaintiff had not complied with the statutory provisions giving it the right to do business here. *Tindal v. Maxwell*, 58 Ala. 40; *Collier & Pinckard v. Dudley*, 87 Ala. 431; *Mullens v. Amer. Freehold Mortgage Company*, 88 Ala. 280.

COLEMAN, J.—Facts which are averred in a complaint need not be pleaded in defense, or, if set up in a plea, as a general rule, need not be proved by the plaintiff. So far as the rights of the plaintiff are concerned, the defendant has the right to consider facts averred in the complaint to be true.

The complaint in this case sufficiently shows that plaintiff
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is a foreign corporation. The plaintiff offered in evidence a promissory note, headed and dated Uniontown, Ala. *Prima facie*, Alabama was the place of its execution, and no other evidence being offered on this question, the law presumes the contract was made in Uniontown, Ala.—*Farrior v. Security Co.*, 88 Ala. 27; *Amer. Freehold Land Mortgage Co. v. Sewell*, 92 Ala. 163. It was proven without dispute that plaintiff had not complied with the Constitution of the State, and the statutory provision which requires that foreign corporations shall have a known place of business and an authorized agent before doing business in this State.

It has been frequently decided that, however immaterial, defective, or demurrable a plea may be, if issue be joined upon the plea, and the evidence sustains it, the defendant has the right to have the court to charge the jury upon such plea.

The record shows that plaintiff filed several demurrers to the pleas of the defendant. After this was done, the defendant, by leave of the court, withdrew his pleas, and demurred to the complaint. The court overruled the demurrer to the complaint, and by leave of the court the defendant re-filed his former pleas. The record does not inform us that plaintiff re-filed his former demurrer to the pleas of defendant. After the defendant's pleas were re-filed, as shown in the judgment of the court, the only entry is, that "plaintiff by its attorney demurs to said pleas." The demurrer, or assignments for cause of demurrer, upon which the court ruled, being no where stated in the record, we must presume in favor of the correct ruling of the court that the demurrer was general, or insufficient, even though the plea might have been held defective as against a demurrer properly framed.—*Masterson v. Gibson*, 56 Ala. 56. We must consider the pleadings as if issue had been joined upon all the pleas except the 4th, without the interposition of a sufficient demurrer. The 7th plea of defendant, not to mention others, was fully sustained by evidence which was not contradicted.

The bill of exceptions states that, in consequence of the charge given by the court to the jury, the plaintiff "took a nonsuit, and reserved the point for the determination of the Supreme Court by bill of exceptions." The record of the judgment shows that "plaintiff, in open court, excepts to the ruling of the court overruling its demurrer to the pleas Nos. 1, 2, 3, 5, 6 and 7, and also excepts to the charge of the court to the jury, and by consent of the court takes a nonsuit with a bill of exceptions."

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A nonsuit taken in consequence of adverse rulings on the pleadings, is voluntary, and does not fall within the statute, which authorizes a plaintiff suffering a nonsuit to reserve by bill of exceptions rulings of the court for review on appeal to this court.—3 Brick. Dig. 678, § 5, and authorities cited.

A nonsuit was taken in consequence of the charge given by the court to the jury. The correctness of the charge is properly before us for review. In view of the pleadings and the evidence, there was no error in the charge given.

It is not every act done by a foreign corporation in this State, to which the Constitution and statute apply, which require that it shall have a known place of business and an authorized agent.—*Brown Hamilton Shoe Co. v. Ware*, 92 Ala. 145; 9 So. Rep. 137. The statute does apply to the loaning of money.—*Nelms v. Edinburgh Amer. L. Co.*, 9 So. Rep. 141; 92 Ala. 157.

The application of the foregoing principles leads to an affirmance of the case.

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Motion to retax Sheriff's Commissions in Attachment Case.

1. *Commissions of sheriff, on settlement without sale.*—When an attachment case is settled without a sale of the property levied on, the half commissions to which the sheriff is entitled (Code, § 3687) are to be estimated, not on the amount claimed in the affidavit and complaint, but on the amount paid and accepted on the settlement.

APPEAL from the City Court of Anniston.
Tried before the Hon. B. F. CASSADY.

H. C. TOMPKINS, and J. J. WILLETT, for appellant.

CALDWELL & JOHNSTON, *contra*.

WALKER, J.—The attachment in this case was sued out for the sum of twelve thousand dollars. The amount really due to the plaintiff was less than four thousand two hundred dollars. That amount was paid by the defendant to the plaintiff before judgment. In taxing the costs, the sheriff was allowed commissions on twelve thousand dollars, and Vol. 95.

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the Circuit Court refused to reduce this item, or to order the commissions to be taxed only on the amount really due and paid. The following is the provision fixing the sheriff's commissions in such a case: "When an attachment is by him levied on personal property, which is replevied, or the cause is settled without a sale, he is entitled to one half the commissions upon the amount of the demand sued for, allowed him for making money on execution, to be paid by the party paying such demand, or replevying such property." Code, § 3687. The word "demand," as used in this statute, does not mean the amount claimed, or the damages laid in the attachment affidavit, or in the complaint. It means what the plaintiff was entitled to require the defendant to pay. In ordinary legal usage the words "debt and "demand" are of kindred meaning, but the latter word is a term of much more comprehensive signification than the former. The term "debt" imports a sum of money owing upon a contract, express or implied; while the term "demand" embraces rightful claims, whether founded upon a contract, a tort, or a superior right of property.—*In re Denny*, 2 Hill (N. Y.), 220; *Drews v. Coles*, 2 Tyrw. 510. The statute which enumerates the classes of "demands" for which attachments may issue, in the first place, authorizes the issue of the writ "to enforce the collection of a debt;" next, "for any moneyed demand, the amount of which can be certainly ascertained." Code of 1886, § 2929. In such connection, the meaning of the words "debt" and "demand" is plain. They are used to describe certain classes of rights of action. Neither of them covers anything more than what is due to the plaintiff in attachment—the amount which he is entitled to recover. We think it is plain that the phrase, "the amount of the demand," as used in the statute fixing the sheriff's commissions when the attachment suit is settled, means the amount which the plaintiff was entitled to be paid by the defendant. To construe these words as requiring the commissions to be calculated on the amount claimed by the plaintiff, regardless of what was really due, would result in putting it in his power to defeat one of the purposes of the statute. It was evidently intended by the statute to secure to the defendant the right to save costs by discharging his liability, or by replevying the property, before a sale of it under the writ. If the plaintiff could swell the commissions to be paid by the defendant on a settlement, merely by making an extravagant claim, then the defendant, by paying all that was confessedly due, might become chargeable with a larger sum for the sheriff's commissions than if he had

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allowed the execution of the writ to proceed; and if, as in the present case, the plaintiff had claimed more than twice as much as was really due, the one-half commissions on the amount of the claim would be more than the whole commissions which would be payable if there had been no settlement, but the property had been sold under the writ and the plaintiff had recovered judgment for all that was really due. It was never intended to give the plaintiff in attachment the power to make it a positive disadvantage to the defendant to discharge his liability, or to replevy the property before a sale. A construction of the statute involving such a result is unreasonable, and is not required by the language used. The one-half commissions of the sheriff should have been computed on the amount which was really due, and which was paid by the defendant to the plaintiff.

Reversed and remanded.

Cowen v. Eartherly Hardware Co.

Action on Account for Goods Sold and Delivered.

1. *Admission as to facts in issue.*—In an action on an account, an admission by the parties that, if defendant is entitled to a certain credit claimed by him, then he is entitled to recover, and if not then plaintiffs are entitled to recover, dispenses with the necessity of any proof of the account, and leaves only the question of the sufficiency of the evidence to establish the credit claimed.

2. *Set-off, or payment; partnership and individual demands*—In an action by a partnership on an account for goods sold and delivered, the defendant can not claim a set-off for the price of a horse sold by him to one of the partners individually; nor is he entitled to claim it as a credit, or partial payment, because the partner so promised, when it is shown that the other partners repudiated his promise.

3. *General charge on evidence.*—When the plaintiff's claim is admitted, and the evidence adduced by the defendant would not authorize a verdict in his favor on the attempted defense, the court may instruct the jury, without hypothesis, to find for the plaintiff; and may, also, refuse to instruct them that, "if they do not believe the evidence, they must find for the defendant."

4. *Recalling jury; error without injury.*—The defendant can not complain of any error or irregularity on the part of the court below in recalling the jury and giving them additional instructions, when the record shows that the court might have instructed the jury, without hypothesis, to find for the plaintiff.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. JOHN B. TALLY.

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[Cowen v. Eartherly Hardware Co.]

This action was brought by the "Eartherly Hardware Company," a mercantile partnership doing business in Nashville, Tennessee, against J. W. Cowen; and was founded on an account for goods sold and delivered, each count claiming \$62 as the balance due. The opinion states the only issue in the case, and all the evidence bearing on that issue. On all the evidence adduced, which the bill of exceptions purports to set out, the court charged the jury, on request, "that they should find for the plaintiff, if they believed the evidence, and assess the damages at \$50, with interest;" to which charge the defendant excepted. The jury returned a verdict for the defendant; "whereupon the court told them that they were discharged, and that he would set aside the verdict; but, before they had retired outside of the bar, the court called them back, told them that he would not receive the verdict, and would not discharge them, but would send them back to their room; and the court then stated to them that, under the written charge which had been given them, they could not do anything but return a verdict for plaintiff. To this charge, and to the action of the court in refusing to receive the verdict, and in sending the jury back, the defendant excepted;" and he also excepted to the refusal of the court to instruct the jury, on his request, "that they should find for the defendant, if they do not believe the evidence."

The assignments of error embrace all the rulings to which exceptions were reserved.

BROWN & STREET, for appellant.

LUSK & BELL, *contra*.

STONE, C. J.—This suit was founded on an account for merchandise sold and delivered by Eartherly Hardware Company, a mercantile copartnership. The bill of exceptions affirms that, if the defendant was not entitled to credit on this account, for a certain mare which he let Harry Jones, one of the plaintiffs, have, "the plaintiffs were entitled to recover; but, if defendant was entitled to this credit, then defendant was entitled to recover." Under this admission, the plaintiffs were relieved of all duty to make out their case, or to make any proof. The burden was cast on the defendant to prove his defense; and if he offered no testimony, or insufficient testimony to establish his defense, the verdict and judgment should have been for plaintiffs. So, the legality and sufficiency of defendant's testimony were the only inquiries raised on the trial.

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Plaintiffs were wholesale merchants of Nashville, Tennessee, and Jones, a member of the firm, was their travelling salesman for Alabama. He was in the habit of visiting defendant at his place of business in Alabama, and frequently sold him bills of goods, though sometimes he did not. On one of his visits he purchased the mare in controversy, at the agreed price of fifty dollars, but did not pay for her. He has never paid for her. The purchase was made while the firm was in active business, hardware being its line of trade. There was no proof that it dealt in any thing else. The sole question in this case is, whether the fifty dollars, unpaid price of the mare, is a payment on, or discount from the account of Cowen, the defendant, contracted with plaintiffs in the purchase of hardware. Cowen's account of the transaction, given in his testimony, was in substance, "that in August, or September, 1886, he let Jones have a mare, for which he was to give him a credit of \$50.00 on his account with the Eartherly Hardware Company; . . . that Jones was at defendant's home when he got the mare. Jones was travelling and selling goods for the house, and defendant thought he bought a bill of goods from him at the time. On further examination he said, he did not remember buying goods at the time. Jones tried the mare to his buggy, to see if she would work. He said he wanted her for his wife. . . . When in the country, off the railroad, Jones usually travelled in conveyance drawn by horses." The purchase, its agreed price, and non-payment of it, were also shown by the admissions of Jones; but he added, "There was no positive agreement whether the amount I agreed to pay, fifty dollars, was to be credited to his account or not." These admissions were made after the dissolution of the firm, but they went in evidence to the jury without objection. Jones was willing and anxious that the credit should be allowed. There was no testimony that the partnership authorized the purchase, or agreed to ratify it, as made on partnership account. The testimony of Eartherly was that the firm refused to allow the claim as a payment. See *Manning v. Maroney*, 87 Ala. 563.

It is not contended that, as a mere cross-demand against one member of the firm, defendant's claim could avail as a set-off against a partnership demand. Such contention, if made, has too often been disallowed by this court to require further notice.—*Watts v. Sayre*, 76 Ala. 397, and authorities cited.

The question then is, whether there was any testimony tending to prove an agreement to receive the agreed price

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of the mare as a payment or discount of and from the claim sued on? If there was such testimony, then its weight and sufficiency were necessarily questions for the jury, and could not be passed on by the court. The testimony of Cowen, the defendant, was more favorable to his view than that of the other witnesses. Did it raise an inquiry that should have been submitted to the jury? If *White v. Toles*, 7 Ala. 569, were now recognized as authority, this question would have to be answered in the affirmative. In *Cannon v. Lindsey*, 85 Ala. 198, that case was overruled. It was there said: "One member of a partnership, whether existing or dissolved, can not appropriate the assets of the firm by transferring them in satisfaction of his individual debt to such transferee, without the authority or consent of the other members of the firm. Such transaction is considered a fraud on the other partners, and the title to the joint fund or property is not divested in favor of the separate creditor, whether he knew it to be partnership property or not. 'In short,' as said by Judge Story in a leading case on this subject, 'his right depends, not upon his knowledge that it was partnership property, but upon the fact whether the other partners had assented to such disposition or not.' " Many authorities were cited in support of this principle. In reference to *White v. Toles*, *supra*, it was said, that if not distinguishable from the one before the court, it was "opposed to many other decisions of this court, and (was) wrong in principle." To the same effect are *Pierce v. Pass*, 1 Por. 232; *Halstead v. Shepard*, 23 Ala. 558; *Saltmarsh v. Bower*, 34 Ala. 613; *Humes v. O'Bryan*, 74 Ala. 64; *Davis v. Blackwell*, 5 Bradw. (Ill.) 32; *Thompson v. Howard*, 2 Ind. 245; *Selden v. Bank of Com.*, 3 Minn. 166; *Livingston v. Roosevelt*, 4 Johns. 251.

If the rule were such that one dealing with an individual partner, in ignorance that he was employing partnership effects for individual purposes, would be protected, that would not help the present appellant. He himself testified that Jones informed him that he was purchasing the mare for his wife's use. This was notice that the purchase was not made for the use of the partnership.

We need not inquire whether Jones' deposition was rightly suppressed. It is copied in the record, and contains nothing which could have benefited Cowen. It is not error to reject immaterial testimony.

Interpreting the testimony with the most liberal intentions in favor of the appellant, it contains nothing from which the jury, under proper instructions, could have found

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a verdict for the defendant. The plaintiffs' claim being admitted, and the sole question being whether the defense was made good, it would not have been error if the trial court had instructed the jury, without hypothesis, to find for the plaintiffs. Nor should the court have instructed the jury, as requested, that "if they did not believe the evidence, they should find for the defendant." All the testimony given or offered was defensive in its object, and not believing it was to leave the defense wholly unsupported.

Having ascertained that the court would have committed no error if the general instruction to find for the plaintiffs had been given without hypothesis, it follows that any error that may have been committed was harmless. And this principle applies to any irregularity that may have been fallen into in recalling and re-instructing the jury. It was at most error without injury.—*Crutcher v. M. & C. R. R. Co.*, 38 Ala. 579; 3 Brick. Dig. 405, § 20.

Affirmed.

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Action on Common Counts for Work and Labor Done, and Materials Furnished.

1. *Plea of tender; acceptance of money paid into court*—When a tender before suit brought is pleaded (Code, § 2885), and the plaintiff neither demurs to the plea, nor takes issue on it, but accepts the money paid into court, the defendant is entitled to have the suit dismissed.

APPEAL from the City Court of Anniston.

Tried before the Hon. B. F. CASSADY.

MCLEOD & TUNSTALL, for appellants, cited *Monyhan v. Moore*, 77 Amer. Dec. 468, note; *Park v. Wiley*, 67 Ala. 310; *Wright v. Young*, 70 Amer. Dec. 453; *Monroe v. Chaldeck*, 78 Ill. 429; *Haenssler v. Dumoss*, 14 Mo. Ap. 103; *Appleton v. Donaldson*, 3 Penn. St. 381; *Cain v. Gimon*, 36 Ala. 168; 51 Texas, 98; 45 Mich. 14.

BLACKWELL & KEITH, *contra*, cited 9 Bacon's Abr. 344-6; *Supply Ditch Co. v. Elliott*, 3 Amer. St. 586.

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CLOPTON, J.—The suit is for money due plaintiff for materials furnished and labor done in repairing the dwelling-house of defendant and an out-house, and erecting a fence around his lot. The only disputed question of fact is the amount due. In answer to the suit, which was commenced August 18, 1890, defendant filed a plea of tender of the amount claimed by him to be due, accompanied by the delivery of the money into court. Plaintiff, without demurring to the plea, or taking issue thereon, received, February 2, 1891, the money from the clerk, under the order of the court, and struck from the complaint the amount so received. Thereupon defendant moved to dismiss the suit at the cost of plaintiff. What is the legal consequence, when the plaintiff elects to take, and receives the money brought into court upon a plea of tender before suit commenced, is the controlling question presented by the record, and the only one necessary to be considered.

As a general rule, a debtor has no right to insist that his creditor shall, by the reception of the amount tendered, be precluded from claiming that a greater sum is due, and suing to recover the same. A tender on such conditions that its acceptance would constitute, or clearly imply, an admission by the creditor that it was in full of his claim, is invalid, and may be refused. The only effect of a tender refused, if pleaded and the truth of the plea established, is to stop the interest, and exempt the defendant from the costs of a subsequent suit. While a mere tender, though of the whole amount due, when unaccepted, does not operate to extinguish or satisfy the claim, yet, when made in full of the amount due, and accepted, without protest as to its sufficiency, the debt becomes extinguished. The creditor may reject a tender on condition that he receive it in full of his claim, but if he accepts it, he is bound by the condition, and will not be allowed to keep the money and repudiate the condition.—*Miller v. Holder*, 18 Ver. 337. A tender, if accepted, is accepted as made. The statute (Code, § 2685) requiring a plea of the tender of money to be accompanied by a delivery of the money to the clerk of the court, is declaratory of the general rule. A plea of tender, if in proper form, contains, substantially, the averment that the sum tendered and brought into court is the entire amount due plaintiff. The plea is in bar of, and, if proved, defeats any recovery. Bringing the money into court, on such plea, has all the effect of a tender on condition that the plaintiff receive the amount in full satisfaction of his claim. It is disbarred of the principle, that a tender can not be made in

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such manner that the reception of the money satisfies the creditor's demand. The object of the statute, in requiring a plea of tender to be accompanied by a delivery of the money to the clerk of the court, is, that it shall be placed in the custody of the court, so that it may be paid to plaintiff whenever willing to accept it, and put an end to the litigation, or may be awarded to the party to whom it is ascertained to belong rightfully.—*Frank v. Pickens*, 69 Ala. 369.

Though the money is produced, and placed in the custody of the court, it remains the property of the defendant, until either the plaintiff accepts it, or the truth of the plea is established; in either event, the court may order it paid to the plaintiff.—*Foster v. Napier*, 74 Ala. 393. So also, where the plaintiff voluntarily accepts the money paid into court, without contesting the sufficiency or truth of the plea, it thereby becomes his property; but its acceptance is upon the terms of the plea, that is, in full satisfaction and extinguishment of his claim.

When the benefit of the tender is claimed in court, the plaintiff may elect to receive it, and put an end to the litigation, or he may take issue on the plea, and contest the fact, validity and sufficiency of the tender. The voluntary reception of the money by plaintiff is tantamount to a confession or admission of the truth of the plea—equivalent to an acceptance of the money in satisfaction of his entire demand; he can not afterwards say that it was accepted only as a payment *pro tanto*. Under the common-law rule, if the plaintiff take the money which has been brought into court, on a plea of tender before suit, the proper judgment is, *eat inde sine die*.—9 Bacon's Abr. 339. The same result logically follows, when the plaintiff withdraws the money brought into court under the statute. In such case, if the plaintiff elects to take the money, the proper practice is for the court to order it paid to him, and render judgment against him for costs.—*Haeussler v. Dumoss*, 14 Mo. App. 103; *Monroe v. Chaldeck*, 78 Ill. 429. The motion of defendant should have been granted.

We have not considered whether the proof shows a valid tender, as no such question is raised by the record.

Reversed, and judgment rendered dismissing the suit at the costs of plaintiff.

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Ward v. Ward.

Bill in Equity by Widow and Children, against Executor as Testamentary Trustee, asking Removal of Administration, Construction of Will, etc.

1. *Testamentary trusts; equitable jurisdiction over trustee.*—A court of equity has undoubted jurisdiction, at the instance of the widow and children of a testator, to compel the executor, as testamentary trustee, to make a suitable provision for them out of the income of the estate, according to the terms and spirit of the will, notwithstanding the general discretionary powers given to the trustee in the management of the estate.

2. *Same: allowance to beneficiaries for support and maintenance; pleading and practice.*—Under a bill filed by the widow and minor children of the testator, beneficiaries under his will, seeking to remove the administration of the estate into equity, and asking relief against the executor as testamentary trustee; a petition being filed praying an allowance out of the estate for the support and maintenance of the complainants and the education of the children, and a reference to the register being ordered to ascertain what would be a reasonable allowance; if the widow then withdraws from the cause as a party, electing to dissent from the will, the complainants can not then complain, nor can the widow or children separately complain, that the chancellor refused to act on the register's report as to what would be a reasonable allowance for their joint support as prayed in the petition.

3. *Bequest for benefit of testator's father, mother and sister, as members of his family.*—Where the testator had contributed liberally during his life to the support of his father, mother and sister, as members of his family, and by his will declared, "I desire, if agreeable to the parties concerned, that my mother, father and sister shall continue to reside with my family, and that my trustee shall contribute towards their support out of my estate as I do at this time;" held, that this provision was not intended to make the contribution for the support of the father, mother and sister dependent upon their continued residence in the same house with the widow, nor upon the fact that it was agreeable to her; and that the trustee was authorized to continue a reasonable allowance to them, according to the income of the estate, although they and the widow had removed from the testator's residence, and occupied different dwellings.

4. *Parties to bill for administration of estate; intervention by petition.* The widow of a testator having filed a bill, jointly with her children, for the removal of the administration from the Probate Court, and other relief against the executor as testamentary trustee, and having then withdrawn from the case as a party, and elected to dissent from the will, is nevertheless a necessary party to the bill, and can not intervene by petition, asking to have her dower and distributive interest in the estate allotted to her.

APPEAL from the Chancery Court of Mobile.
Heard before the Hon. WM. H. TAYLOR.

[Ward v. Ward.]

The bill in this case was filed on the 5th July, 1890, by Mrs. Rebecca E. Ward, the widow of Benjamin Ward, deceased, jointly with her three minor children, against Alfred G. Ward, a brother of said Benjamin Ward, as his executor and testamentary trustee; and sought (1) to remove the administration of the estate from the Probate into the Chancery Court, (2) to require the executor to file an inventory and give bond, or (3) remove him and appoint another person as trustee in his stead, and (4) to obtain a judicial construction by the court of the provisions of the will.

Benjamin Ward, the testator, died in Mobile on the 15th December, 1888; and his last will and testament, dated October 22d, 1887, was there proved and admitted to probate on the 31st December, 1888, letters testamentary being granted to Alfred G. Ward as executor. The will contained these provisions: "I hereby devise and bequeath all my property, whether real, personal or mixed, to my brother, Alfred G. Ward, in trust, however, and upon the following conditions: (1.) I desire him first to pay all my just debts and funeral expenses. (2.) I desire him to furnish my beloved wife with means sufficient to maintain her in a comfortable manner suitable to her station in life. (3.) I desire him to see to the support and education of such children as I may leave surviving me. (4.) I desire, if agreeable to the parties concerned, that my mother, father and sister shall continue to reside with my family, and that my trustee shall contribute towards their support out of my estate as I do at this time. (5.) For the execution of these trusts, I hereby appoint my said trustee my sole executor, with full power to dispose or mortgage any of my property devised, whenever he may deem it expedient to do so, and to execute conveyances to the purchaser thereof. This may be done at public or private sale, and without order of court, or other legal proceedings. I give him full power to invest and re-invest the proceeds of said property, and also any other money I may have on deposit or elsewhere, that shall come into his hands in the execution of these trusts. I desire him to carry on my present drug business, and, if he desires, he may purchase an interest in the same, take in a partner, or make such other disposition or arrangement with regard thereto as may seem best to him. When my surviving children shall come of age, I desire my trustee to give them their portion of what there [then?] remains of my estate in bulk. I desire my trustee to take for himself a suitable remuneration for his services in the faithful discharge of these trusts, and, having

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unlimited confidence in him, I do not wish him to be required to give bond or security as such trustee or executor. In witness whereof," &c.

The complainants claimed, and alleged in their bill, that the executor had mismanaged the estate—that he had failed to pay off the debts of the estate, and had contracted new debts in carrying on the business, for which he contended the estate was liable; that he refused to make a suitable allowance for the support and maintenance of the complainants, but limited them to \$150 per month, which was not sufficient for their support in the city, and they had been compelled to remove to the country; that the father, mother and sister of the testator had also left the house, and moved to the residence of the executor, where he supported them at the expense of the estate; and that he refused to give the complainants any information as to the condition of the estate. They therefore prayed that the administration of the trust estate be removed into the Chancery Court; that the executor as trustee be required to file an inventory, and his accounts and vouchers for a partial settlement of the estate, more than eighteen months having elapsed; that the court would construe the will, declare the rights of the respective parties, require the executor to give bond, or appoint another trustee in his stead, &c.

The defendant demurred to the bill, (1) for misjoinder of complainants, (2) for non-joinder of necessary parties as defendants, (3) because the will relieved him of the duty of giving any bond, and on other grounds. The bill was amended by adding the testator's father, mother and sister as defendants, and the demurrer on other grounds was overruled. The executor then filed an answer, giving a statement of his administration, and annexing an inventory; admitting that he had removed his father, mother and sister to his own house, after the complainant had gone to her own father's house, and was contributing to their support as the will authorized and required him to do; alleging that the condition of the estate did not permit a greater allowance to the widow and her children than \$150 per month; and adding, "Respondent prays that the court will take jurisdiction of the cause, give him full instructions upon all points in controversy, and especially fix the allowance to be made to complainants, and the extent to which he is authorized to contribute, out of the estate, to the support of testator's father, mother and sister."

On the 3d December, 1890, a decree was rendered assuming jurisdiction of the estate; and on the next day, on ap-

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plication of the complainants, a reference to the register was ordered, to ascertain and report what would be a suitable monthly allowance to the complainants out of the estate, the executor being ordered to continue to pay them \$150 per month in the meantime. On the 17th January, 1891, the register reported that \$250 would be a reasonable monthly allowance, and he reported the evidence taken before him. Exceptions to the report being filed by the defendant, and a motion submitted by the complainants to overrule them and confirm the report, the court rendered a decretal order in vacation, April 1st, 1891, declining to act in the matter before the final hearing of the cause.

On the 20th April, 1891, the complainants asked leave to amend their bill by striking out the name of Mrs. Ward as a complainant, on the ground that she had dissented from the will and elected to take her dower and distributive share of the estate; and the amendment was allowed on the next day, April 21st. On the same day Mrs. Ward filed a petition in the cause, asking an assignment to her, under the orders of the court, of her dower interest and distributive share of the estate, on account of her dissent from the will. On May 4th the children, the remaining complainants, asked a reference to the register to ascertain and report what would be a proper allowance for their support and education under the terms of the will. The cause being submitted for decree on this motion and petition, the chancellor rendered a decree in vacation, 30th June, 1891, overruling and refusing each of them, but giving the parties permission to renew their application, and reserving all other questions for future consideration.

The complainants appeal, and make 15 assignments of error jointly, and Mrs. Ward separately assigns as error the dismissal of her petition.

OVERALL & BESTOR, for complainants; and BRICKELL, SEMPLE & GUNTER, for Mrs. Ward.

CLARKES & WEBB, *contra*.

MCCLELLAN, J.—We do not understand from this record that the Chancery Court declined to assume jurisdiction and control over the trusts created by the will of Benjamin Ward for the support of his wife and children, to the end of determining what provision would be reasonable and proper in that behalf, and compelling the trustee to make such provision. On the contrary, we find that the lower court

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virtually asserted its right and power to determine what allowance should be made by the trustees for the maintenance of the testator's widow and children and for the education of the children, and, of consequence, its authority to compel such allowance to be made, though counsel argue the question whether this matter should be left entirely to the trustee's discretion as if they understood the position of the chancellor differently; and there can, in our opinion, be no doubt the right and power thus asserted resides in the Chancery Court, and should be exercised by it whenever it is clearly made to appear that the trustee is not adequately providing for the well-being of the *cestui que trustent* according to the terms and spirit of the trust instrument.—*McDonald v. McDonald*, 92 Ala. 537, and authorities there cited.

What the court really decided in this connection, however, was that a case had not been made by the evidence which required or authorized the exercise of this jurisdiction, it not being made to appear that the trustee had failed or was omitting to make proper allowance for the support and education of the *cestuis que trust*. When the cause came on for hearing, the widow was no longer a party to it; she had had herself eliminated from the bill as a party complainant; she was not a defendant, and she was asking no action of the court looking to an increase of the allowance for support theretofore made to her by the trustee. Before this withdrawal on her part a reference had been had in response to the prayer of the bill as originally exhibited, to determine what would be a reasonable allowance for her and her three children; and the master had reported that two hundred and fifty dollars per month should be allowed, instead of the one hundred and fifty dollars per month which the trustee was then paying on that account. The evidence taken on this reference, and the report made, however, had relation to an allowance in gross for the children and for the widow. No evidence was adduced, and no report made, as to what should be allowed for the support and education of the children, who were the sole complainants in the bill at the hearing, and who only were demanding an increase of the provision made by the trustee for them. The court did not pass on the master's report while Mrs. Ward remained a party complainant to the cause. Whether, had she maintained her original attitude, the additional allowance to her and the children reported by the master should have been decreed, is a mere abstraction on this appeal,—an inquiry not presented for our consideration. There was nothing in the report, or in the evidence supporting it, which could

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afford a basis for determining what provision was proper for the children alone. This depended upon testimony which they had the *onus* of adducing—as was said by the chancellor, they are not entitled under the will to any fixed allowance (*Ellerbe v. Ellerbe*, 40 Am. Dec. 623)—and having failed to show what amount they were entitled to, or that the sum allowed by the trustee was inadequate, the refusal of the Chancery Court to increase that allowance, or indeed to make any decree fixing their allowance, was inevitable.

Nor was there error in the construction given to the 4th clause of Benjamin Ward's will, which is as follows: "I desire, if agreeable to the parties concerned, that my mother, father and sister shall continue to reside with my family, and that my trustee shall contribute towards their support out of my estate as I do at this time." It can not be that the testator, solicitous for the maintenance of his father, mother and sister, and who had contributed largely to their support during his life, intended to make their future well-being to depend upon their continuing to reside in the same house with his widow, and to make such continued residence dependent upon the fact of its being agreeable to her, who was a stranger to their blood, and whose interests would be conserved by defeating his laudable purpose in respect to them. We concur with the chancellor that the support of the testator's father, mother and sister provided for in this clause of the will was not conditional upon their continued residence with the widow and her family; and with him also, on the showing of the answer, that the provision made for them by the trustee was such as was being made for them by the testator at the time of executing the will, and hence within its expressed limitations.

At the time of filing her petition dissenting from the will and claiming a distributive share in her husband's estate, Mrs. Ward was not a party to the cause pending in the Chancery Court; she was as much a stranger thereto as if she had previously had no connection therewith. Yet she was a necessary party to that cause. There could be no settlement of the trusts of the will, or the administration of the estate, without her rights being before the court and represented by her as a party litigant in the widest sense of the term. Whether she dissents from the will or takes under it, her rights as a party to the cause are co-extensive with those of any other of the necessary parties in the sense of shaping the litigation, being heard upon any action taken and any decree to be rendered in it. Her claim is not of a specific sum to be paid out of a fund in court, as in the case

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of a receivership which has become indebted to a person having no interest in the controversy between the complainants and defendants to the cause, and which may be preferred by a mere petition since it involves no element either of prosecution or defense in the case presented by the bill and answer (*Thornton v. Highland Avenue & Belt Railway Co.*, 94 Ala. 353); but, if she comes into the cause at all, it is for all the purposes of prosecution or defense as the case may be; and she can not make herself a party for such purposes by a petition. She can only get into this cause, strictly speaking, by the action of the present complainants through an amendment of their bill; or, failing in that, she may effectuate whatever rights she may be entitled to by an original bill in its nature suppletory to the present litigation. The chancellor properly dismissed her petition. *Cocles v. Ledyard*, 39 Ala. 130; *Renfro Bros. v. Goetter, Weil & Co.*, 78 Ala. 314; *Ex parte Printup*, 87 Ala. 148.

Affirmed.

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Action for Damages against Railroad Company, by Administrator of Deceased Employee.

1. *Railroad corporation under charter granted by two or more States.* The Memphis & Charleston Railroad Company, incorporated by legislative acts in Alabama, Tennessee and Mississippi, though under the same name, owned by the same stockholders, invested with like franchises, and operated under the same management, is composed of three separate legal entities; and the averment that it "is a unit as a corporation" is the mere statement of a legal conclusion, unsupported by the facts.

2. *Action against corporation in Alabama, for tort committed in Mississippi.*—An action can not be maintained against a railroad corporation in Alabama, for a tort committed in Mississippi, unless the tort was actionable at common law, or is shown to be actionable by statute in Mississippi.

3. *Common law; presumption as to; liability of employer for injuries to employee.*—The common law, which is presumed to exist in a sister State in the absence of evidence to the contrary, did not give an action for damages against the employer, where death resulted to an employee from the culpable negligence of a co-employee.

4. *Mississippi statutes giving action to personal representative of decedent.*—The statutes of Mississippi which authorize an executor or administrator to prosecute any personal action which his testator or

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intestate might have prosecuted, and to maintain an action for any trespass to the person or property of the decedent (Rev. Code of Miss., §§ 2078-9), are not substantially similar to the Alabama statute (Code, §§ 2590-92) known as the "Employer's Act."

APPEAL from the Circuit Court of Colbert.

Tried before the Hon. HENRY C. SPEAKE.

This action was brought by John Kahl, as administrator of the estate of John P. Kahl, deceased, who was killed on the 1st April, 1887, near Corinth, Mississippi, while in the discharge of his duties as engineer on one of the defendant's trains, by a collision with another train, alleged to have been caused by the negligence of the conductor, to whose orders he was subject; and was commenced on the 28th March, 1888. Each count of the complaint was framed under the statute (Code, §§ 2590-91), and each alleged that the defendant was, at the time the injury was inflicted, a domestic corporation under the laws of Alabama, owning and operating a line of railroad between Stevenson, in Jackson county, Alabama, and Memphis, Tennessee. An amendment was afterwards added to each count, as follows:

"Defendant is a railroad corporation, chartered by the laws of Alabama, Mississippi and Tennessee, and its line of railroad extends from the city of Memphis, in Tennessee, to the town of Stevenson in Alabama; it is a continuous line of railroad from and to each of said places, through the States of Alabama, Mississippi and Tennessee, and was, at the time plaintiff's intestate was killed, operated under charters procured from each of said States identical in the powers and privileges conferred on it, and was a unit as a corporation, and had a legal residence in each of said States by which it was chartered, and through which its road runs. Plaintiff avers that his intestate, at the time he was killed, was a citizen of Alabama, and was in the defendant's employment under a contract which was made in Alabama; that he was an engineer on one of defendant's locomotives, and the contract of his employment made it his duty to serve the defendant as engineer in running a locomotive from Tuscumbia, Alabama, through the State of Mississippi, to the city of Memphis, and return. He avers, also, that the statutes of Alabama and Mississippi, at the time said intestate was killed, giving him a right of action by reason of the death of his intestate and under the circumstances above stated in each count of this complaint, were precisely the same and alike, and in each of said States a right of action is given to plaintiff, and was given at the time of his intestate's death, for the injury which caused it, the statutes

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on said subject being exactly alike." [Here followed averments that the intestate was killed while in the discharge of his duties as engineer, acting under the orders of the conductor, whose orders he was bound to obey; and that the collision was caused by the negligence of the conductor.] "For the injuries so inflicted the laws of Alabama and Mississippi each give plaintiff a right to bring this suit as administrator, and recover damages commensurate with said injury. He avers that the statutes of Mississippi, under which this action could have been maintained there, are sections 2078 and 2079 of the Revised Code of Mississippi, as follows: SECTION 2078. 'Executors, administrators and collectors shall have full power and authority to commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted; and they shall also be liable to be sued in any court, in any personal action which might have been maintained against the deceased.' SECTION 2079. 'Executors and administrators shall have an action for any trespass done to the person or property, real or personal, of their testator or intestate, against the trespasser, and recover reasonable damages, in like manner as their testator or intestate would have had if living; and the money so recovered shall be assets, and accounted for as such.' And plaintiff avers that, if his intestate had not died from the injuries received, for which this action is brought, he could have maintained an action against defendant, and recovered damages therefor."

A second amendment was added to each count, as follows: "Plaintiff avers that his intestate, at the time he was killed, was not a fellow-servant of the conductor of the train, through whose negligence he was killed; that said intestate was at the time the engineer of the train, and in the performance of his duty as such, and one Guerin was the conductor thereof, and said intestate was subject to his orders, and was obeying said orders at the time of his death, and said obedience of said orders caused his death; and that under the circumstances causing his death, if death had not resulted, his intestate could have sued and recovered damages commensurate with the injury, in the courts of either Alabama or Mississippi; and death having resulted therefrom, plaintiff is entitled to recover therefor, and would be entitled to recover in the courts of Mississippi."

The court sustained a demurrer to the complaint as amended, and this ruling is assigned as error.

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J. B. MOORE, for appellant.—(1.) The complaint shows a good cause of action under the Alabama statute. It shows that the intestate's contract, in the performance of which he was killed, was made with the defendant, a domestic corporation, in this State; and that the defendant was operating, under several charters substantially the same, a continuous line of railroad between Stevenson, Alabama, and Memphis, Tennessee. The boundary line of the State is not the limit of jurisdiction in such case.—*Ala. G. S. Railroad Co. v. Thomas*, 89 Ala. 294. (2.) The statutes of Mississippi, under the amended complaint, authorize the action. (3.) At common law, which is presumed to be of force in Mississippi, if the statute does not apply, an action lies against the employer for injuries received by an employe from the negligence of another person in the service, unless they were fellow-servants; and an engineer is not a fellow-servant of the conductor, whose orders he is bound to obey.—*Railroad Co. v. Ross*, 112 U. S. 377; 17 Wallace, 553; 11 Wisc. 238; 28 Md. 28; Railway Accident Law, 369; 110 Mass. 240; Wood's Master & Servant, § 425; *Railroad Co. v. Phillips*, 64 Miss. 693; *Railway Co. v. Bradford*, 86 Ala. 579.

HUMES & SHEFFEY, *contra*, cited *Willis v. N. P. Railway Co.*, 48 Amer. Rep. 401; *McCarthy v. Railroad Co.*, 26 Amer. Rep. 742; *Davis v. N. Y. & N. E. Railroad Co.*, 58 Amer. Rep. 138; 61 Texas, 432; *Athil v. Huntington*, 14 Amer. St. 523; *Woodward v. Railroad Co.*, 10 Ohio St. 121; 2 Rorer on Railroads, 1149-51, and cases; 136 U. S. 356; *M. & C. Railroad Co. v. Alabama*, 107 U. S. 581.

COLEMAN, J.—The averments of the complaint show that plaintiff's intestate, while acting in the discharge of his duties as an employe of the defendant railroad corporation, was killed in a collision of trains caused by the negligence of the employer. The collision occurred in the State of Mississippi, and the present action to recover damages for the death of the intestate was instituted in the State of Alabama. The court below sustained a demurrer to the amended complaint, and plaintiff declining to further amend, his action was dismissed.

We are of opinion that the amendment added to each count of the complaints clearly avers three separate, distinct and independent constituents of the defendant's corporate character, one created by the State of Mississippi, one by the State of Alabama, one by the State of Tennessee. Vol. 95.

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see, and neither dependent upon the other for existence or authority. The averment that it was "a unit as a corporation," is a mere conclusion of the pleader. Though incorporated by the same corporate name, owned by the same stockholders, invested with like franchises, and operated under the same management, so that practically it is a single corporation, legally speaking the corporation is composed of three separate, independent legal entities, each depending for its existence upon the separate and independent acts of incorporation by the several States through which it passes. If the State of Mississippi should revoke and annul the charter granted by that State, the Memphis & Charleston Railroad Company, as a corporation, would still exist in Alabama and Tennessee, but there would be no such corporation in the State of Mississippi. Neither of the three States can give or take away the legal existence of a corporation beyond its territorial boundary. Within the boundary of Alabama, it is a domestic corporation, beyond that it is a foreign corporation.

These general principles find support in many adjudications.—*Grangers' Life & Health Ins. Co. v. Kamper*, 83 Ala. 225; *Memphis R. R. Co. v. Alabama*, 107 U. S. 581; *Paul v. Virginia*, 8 Wall. 168, 181; *Runhan v. Coster*, 24 Pet. 122; *St. Clair v. Cox*, 106 U. S. 350; *Nashua R. R. Co. v. Lowell R. R. Co.*, 136 U. S. 356.

It would seem to follow that the tort complained of in the present case was committed by a foreign corporation, and beyond the jurisdiction of the State of Alabama. In *Rorer on Railroads*, vol. 2, p. 1149, par. 3, it is said: "The right given by statute to the recovery of damages for injuries caused by the wrongful act or negligence of a railroad company, its employes and servants, is local in the courts of the country or State wherein the right is given by the statute and the injury is incurred." A great many authorities are cited by the author to support the text. See, also, *Central R. R. & Co. v. Carr*, 76 Ala. 393.

The demurrer was well taken for another reason. We think it may be stated as an established proposition, that if the tort complained of was not actionable in the State where it occurred, it will not sustain an action in this State. The present action is purely statutory. At common law, where death resulted from the culpable negligence of a co-employee, under such circumstances as averred in the complaint, no action could be maintained against the master.—*Ga. Pac. R. R. Co. v. Davis*, 92 Ala. 312; *Stewart v. L. & N. R. R. Co.*, 83 Ala. 493; *L. & N. R. R. Co. v. Orr*, 91 Ala. 552. If there

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exists any statute in the State of Mississippi giving an action to the administrator of a deceased employe against the master to recover damages for the death of his intestate, caused by the negligence of a co-employe, or any statute substantially similar to what is known as the "Employer's Act" in this State, such statute ought to have been set out in the complaint. Sections 2078-2079 of the Revised Code of Mississippi, copied in the complaint, do not cover a case like the present. In the absence of such an averment, we must presume the common law was in force in that State; and at common law the present action could not be maintained.

In either view, the demurrer was well taken and properly sustained.

Affirmed.

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Bill in Equity for Removal of Administration of Decedent's Estate, and Cancellation of Conveyances.

1. *Cancellation of conveyances; burden of proof as to mental soundness.* In a suit between the several children of a decedent, the complainant seeking the cancellation of certain conveyances executed by the decedent in his life-time to the several defendants, on the ground that he was of unsound mind at the time of their execution, the presumption being in favor of sanity, the *onus* is on the complainant to overcome it by at least a preponderance of the evidence.

APPEAL from the Chancery Court of Dale.

Heard before the Hon. JOHN A. FOSTER.

M. E. MILLIGAN, for appellant.

WALKER, J.—The appellant is a daughter of Thompson Donnell, deceased. She filed her bill in this case for the removal of the administration of her father's estate from the Probate Court into the Chancery Court, and for the cancellation of certain conveyances of land executed by her father to her three brothers and her sister, who are parties defendant to the bill. The conveyances are attacked on the grounds, that when they were made the grantor therein was not mentally competent, and that he was unduly influenced to execute them. The Chancery Court, by the decree which

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is appealed from, took jurisdiction of the administration of the estate of Thompson Donnell, deceased, but refused to disturb the conveyances made by him in his life-time to his children.

The decree was adverse to the appellant only so far as the validity of the conveyances was sustained. The burden was upon her to show that the grantor in the conveyances was mentally incompetent at the date of their execution. The presumption of mental soundness must be overcome by proof. The evidence is in some conflict upon the question of Thompson Donnell's mental condition in December, 1886, when the deeds were made. He was then an old man, and had had an attack of sickness in the summer of 1885. From that time, according to the complainant's contention, his mind was impaired, and he was not, during the year 1886, mentally competent to attend to ordinary matters of business. The defendants, on the other hand, offered much evidence tending to show that, while Mr. Donnell's health was not as good as it had been before his sickness in 1885, yet he so far recovered that he was able to get about and to manage his affairs as intelligently as he did formerly, until the Spring of 1887, when he was stricken with paralysis. It is conceded that, after the last mentioned attack, his mental faculties were seriously impaired. No good purpose would be served by a discussion of the voluminous evidence in the case. The impression made by a careful review of all the proof is, that when the deeds were executed Thompson Donnell was fully competent mentally to manage his own affairs, and that he executed the deeds voluntarily and with an intelligent comprehension of their import. We are fully satisfied that it was not shown by a preponderance of the evidence that, at the date of the deeds, the grantor was mentally incompetent to convey his property. The charge that the deeds were executed under duress or undue influence is unsupported, and is clearly negatived by the evidence introduced by the defendants. We concur in the conclusion of the chancellor that the attack upon the deeds was not sustained. The complainant has nothing to complain of in any other feature of the decree.

Affirmed.

Cameron v. Cameron.

Bill in Equity to enforce Note as charge against Estate of Deceased Debtor as Trustee.

1. *Partial payments avoiding bar of statute of limitations.*—A partial payment on a debt, made before the statutory bar is complete, prevents the statute from running (Code, § 2628), without regard to the amount paid; but the trifling sums of 25 cents, 50 cents, &c., advanced by a brother to his imbecile sister at intervals of several months, will not be regarded as partial payments on his note for \$600, unless proved to have been made and received as partial payments.

2. *Trust for person of weak mind, voluntarily assumed.*—The relation of voluntary trustee and *cestui que trust*, as between the maker of a note under seal and his sister, a woman of weak understanding, is not established by proof of the facts, that on the sale and distribution of their father's estate, many years before, one of the executors, another brother, retained his sister's share of the proceeds in his own hands for her, she being then a minor and having no legal guardian, and, on a subsequent sale of his property to the maker of the note, preparatory to his removal from the State, the latter assumed the debt as part of the price to be paid, and executed the note payable to the sister for it.

3. *Estoppel against pleading statute of limitations.*—A brother being indebted to his imbecile sister by promissory note under seal, and, on her request to renew the contract before it was barred, replying that "it would never run out of date;" *held*, that this would not estop his widow and children from pleading the statute of limitations in defense of a suit to enforce payment of the debt, although the sister forbore to sue in reliance on it; because, as a promise not to plead the statute, it is itself barred by the statute, and, as an assertion, it is a mistake of law.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 12th September, 1886, by Martha Cameron, against the widow and children of her deceased brother, Daniel Cameron; and sought to enforce payment of a promissory note under seal, which said Daniel Cameron had executed, payable to the complainant, out of property belonging to his estate, in the possession of the defendants. The note was for \$600, was dated September 23d, 1861, and payable one day after date. The note was given under these circumstances: Daniel Cameron, senior, the father of said Martha and Daniel Cameron, died in 1848,

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leaving eight children, and an estate worth about \$5,000. Two of his sons administered on the estate, and sold the property under an order of court, the proceeds of sale amounting to \$4,800. Martha Cameron was then about sixteen years of age, and had no legal guardian; and Hugh Cameron, one of the administrators, assuming to act as her guardian, or trustee, retained her share of the proceeds of sale, \$600. In 1861, Hugh Cameron, being about to remove to Texas, sold his property to said Daniel Cameron, who, in part payment of the agreed price, assumed the debt to Martha Cameron, and thereupon executed said note for \$600.

On a former appeal in the case (82 Ala. 392,) this court held that the averments of the bill, which are set out in the former report, were not sufficient to show that the note evidenced a fiduciary debt. The bill was afterwards amended, by adding these allegations: "Complainant further avers, that said Daniel Cameron received said sum of \$600 from said Hugh Cameron, for the use and benefit of the said Martha Cameron, under an agreement and understanding, then had and made between him and the said Hugh, whereby the said Daniel agreed to receive and hold said sum, and did receive and hold the same, in trust for the said Martha, and to defray out of the said sum and the income thereof the necessary expenses of the said Martha while he continued in said fiduciary relation, and at the expiration thereof to pay her the residue of said sum; and complainant avers that said trust, created as aforesaid, continued from the date of said note until the death of said Daniel Cameron in 1884."

The facts of the case relating to the statute of limitations, which was pleaded, appear in the opinion of the court and the former report. On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is here assigned as error.

WM. L. MARTIN, for appellants.—(1.) The debt was one of trust, and not within the statute of limitations.—*Whetstone v. Whetstone*, 75 Ala. 495; *Vincent v. Rogers*, 30 Ala. 471; *Bonner v. Young*, 68 Ala. 35; 2 Perry on Trusts, §§ 863-4. (2.) The several partial payments preserve the debt from the bar of the statute of limitations.—Code, §§ 2614, 2628; *Minniece v. Jeter*, 65 Ala. 222; *Cameron v. Cameron*, 82 Ala. 392; 3 Brick. Digest, 623, § 94. (3.) Daniel Cameron having, in the year 1867 or 1868, assured Martha Cameron, in response to her request for a new note, that the note she then held was a good note, and that it would never run out of

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date, and Martha Cameron having the right to rely on such assurance, and in fact relying on it to the extent of altering her position, Daniel Cameron and those claiming under him are estopped from now gainsaying the truth of his said declarations.—*Jones v. McPhillips*, 82 Ala. 115; *Adler v. Pin*, 80 Ala. 351; *Lewis v. Ford*, 67 Ala. 147; *Warren v. Hearne*, 82 Ala. 554; *Gillett v. Wiley*, 126 Ill. 310, or 9 Amer. St. Rep. 587; Bigelow on Estoppel, 5th ed., 572-75; 1 Herm. Estop. §§ 5-8; 2 *Ib.* §§ 778-9, 953.

J. E. BROWN, *contra*.

STONE, C. J.—The object of this suit is to collect a bill-single, or note under seal, executed September 23, 1861, by Daniel Cameron, by which he promised to pay Martha Cameron six hundred dollars one day after date. In November, 1862, there was a payment made on the note of one hundred and forty-eight dollars, which is not denied by either party. In 1884, Daniel Cameron died, leaving property, real and personal, the real estate being in excess of 160 acres, worth, probably, more than two thousand dollars. Personal estate worth some three hundred dollars. He died intestate, leaving a widow and several children. No administration was had on the estate, but the widow and children continued to use and occupy the homestead and effects. Daniel and Martha Cameron were brother and sister, and lived very near each other.

The bill in the present case was filed September 15, 1886, by Martha Cameron. She has since died, and the suit is now in the name of her administrator. The widow and heirs-at-law, children of Daniel Cameron, are made defendants. The object of the bill is to enforce payment of the bill-single out of the estate left by Daniel Cameron. Among other defenses the statute of limitations of ten years is pleaded, that being our statutory limitation on such cause of action.—Code, 1886, § 2614.

To forestall the defense of ten years limitation, the bill charges that Daniel Cameron made payments on said sealed note during each of the years 1869 or '70, 1875, 1876, 1877, 1878, 1879, and 1883. These alleged payments were very small, never in excess of two dollars in any one year, and sometimes as low as twenty-five cents. If, however, they were made *as payments on the note*, and, in each case, before the bar was complete, the statute is no bar to recovery. Code, § 2628. The answers deny that any of these alleged payments were made, except the one in 1862, twenty-four

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years before this suit was commenced. The note is made an exhibit to the bill, and purports to have two credits upon it; one of \$148, dated November, 1862, and the other of 25 cents, dated in March, 1883.

A great deal of oral testimony was taken on each side. Some of it was illegal, and properly objected to on that account. In forming our conclusions we have disregarded all such testimony, but consider it unnecessary to specify it. We think the testimony fails to show that any of the small sums of money which Daniel Cameron let his sister have after 1862 were intended, or *in fact* were, payments on the bill-single. We therefore hold that the *prima facie* bar is not obviated by that line of proof.

It is contended, in the second place, that the real relation between Daniel Cameron and his sister was not that of debtor and creditor, but of voluntary trustee and *cestui que trust*. *Vincent v. Rogers*, 30 Ala. 471, and *Whetstone v. Whetstone*, 75 Ala. 495, are relied on in support of this contention. We find nothing in the record to sustain this view. The facts show only a plain case of debtor and creditor.

There is some testimony tending to show that, before the ten years expired after the execution of the bill-single, Martha Cameron asked her brother to renew the contract, and that he replied "it would never run out of date." It is contended for appellant that this estops appellees from interposing the defense of the statute of limitations. There are several answers to this. It was only a promise not to plead the statute of limitations, and the statute runs against that promise as well as against the bill-single itself. We think it would inaugurate a very hazardous, if not injurious practice, if we were to sanction this new and wide departure from the policy which dictated the statute of limitations. A second reason: Whether or not the statute of limitations would run, was a question of law. Against such mistakes, as a rule, there is no redress in any court.—*Clark v. Hart*, 57 Ala. 390; 15 Amer. & Eng. Encyc. of Law, 334; 2 Pom. Eq. § 842. So, on this aspect of the case, appellant is in this dilemma: If we treat the statement as a promise, it is barred by the statute of limitations; if we regard it as an assertion, it was a mistake in law, and not a ground of recovery.

Affirmed.

[Davis v. Badders & Britt.]

Davis v. Badders & Britt.

Action on Written Contract for Building House, and on Common Counts for Work, Labor and Materials.

1. *Submission of pending suit to arbitration; subsequent trial by court.*

When a pending suit is submitted to arbitration, by agreement entered of record, and nothing is done under the submission by the next term (Code, § 3221, the court may, at a subsequent term, proceed and try the same, unless good cause is shown for a further continuance.

2. *Alteration of written contract by parol.*—Under a written contract by which plaintiffs undertook to build a house for defendant according to certain specifications, and at a specified price, containing a stipulation that “no new work done on the premises shall be considered as extra, unless a separate estimate in writing for the same, before its commencement, shall have been submitted by the contractor to the proprietor, and his signature obtained thereto;” the parties may, by mutual assent given verbally, make changes and alterations in the plan as the work progresses; and the work being done as thus agreed on, a recovery may be had for it, either at the price agreed on, if any, or its value, without proof of any written estimate as required by the original contract.

3. *Acceptance of work done under special contract.*—Under a count on a special written contract for building a house, a recovery can not be had without proof of full performance according to its terms; but a recovery may be had under the common count for work, labor and materials, on proof that defendant moved into the house before completion, continued to occupy it after the contractor quit working on it, and that it was of benefit to him.

4. *Complaint; averment of performance.*—In a count on a special written contract for building a house, to recover the balance due, an averment that plaintiffs “have complied with all the provisions of the contract on their part, and erected said building according to said contract,” is a sufficient averment of performance (Code, p. 791, Form No. 9); and it is unnecessary to further aver that plaintiff procured and furnished the certificate of the architect that the work was completed according to the terms of the contract, as required by one of its provisions.

5. *Production of architect's certificate; recovery under special and common counts.*—When the contract requires that the plaintiff, claiming the last installment of the agreed price, shall procure the architect's certificate as to the full and proper completion of the house, or other work to be done, it may be that a recovery can not be had under a special count on the contract, without proof that the certificate was procured, or that it was obstinately or unreasonably withheld; but a recovery may be had under the common counts, for work and labor done and materials furnished, on proof of its acceptance and its value, without regard to the architect's certificate.

6. *Charge as to construction of writing.*—It is the duty of the court to construe a written instrument, and a charge asked which submits its construction to the jury is properly refused.

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7. *Presumption in favor of ruling of primary court refusing charge asked.*—When the bill of exceptions does not purport to set out all the evidence, the appellate court will presume that there was evidence which justified the refusal of a charge asked, if any state of proof would have justified its refusal.

8. *Damages for delay in completion of work*—In an action on a contract for the building of a house, or the performance of other work, the defendant can not claim damages for delay in the completion of the work, when the evidence shows that, by consent, changes were made in the plans and specifications after the commencement of the work, which required a longer time for its completion.

APPEAL from the City Court of Anniston.

Tried before T. R. MATTHEWS, Esq., as special judge.

This action was brought by Badders & Britt, suing as partners, against W. A. Davis and wife, and was commenced on the 6th July, 1888. The original complaint contained a single count, claiming \$560 for work and labor done and materials furnished by plaintiffs in building a house for defendants, and asserting a statutory lien on the property for the amount due. At the August term, 1888, an order was entered submitting the cause to arbitration; and an appeal was taken to this court from the proceedings had at the next term, on motion to have the award of the arbitrators entered up as the judgment of the court.—88 Ala. 367. At the January term, 1891, "the defendants moved the court to refer the cause back to the arbitrators under said order of the court," setting it out, "for decision in accordance with the decision of the Supreme Court on the former appeal; which motion was overruled, and defendant duly excepted." There is no further reference to the former proceedings, nor are they set out in the present transcript.

The plaintiffs then amended their complaint by adding three more counts, numbered 2, 3 and 4, respectively. The 2d count claimed \$560 as the balance due plaintiffs under a special contract for the building of the house, at the agreed price of \$3,000; and averred that plaintiffs "have complied with all the provisions of said contract on their part, and erected said building according to their said contract, but defendants have failed to comply" by not paying the balance due. The 3d count claimed \$560, "balance due for extra work done and materials furnished in constructing said building, which was outside of said contract, and for which defendants agreed to pay plaintiffs while said building was in course of erection, and after said written contract had been made and signed." The 4th count was founded on the written contract, setting it out in full, alleging performance on their part as in the second count, and claiming \$560 as the balance due.

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The contract, as set out in the complaint, and offered in evidence on the trial, was dated July 29th, 1887, and stipulated that the work was to be done according to plans and specifications furnished by Chisolm & Green, architects, "and in a perfectly thorough and workmanlike manner;" that the building was to be completed by the 1st November, 1887; that the agreed price, \$3,000, was to be paid in specified installments as the work progressed, the last installment (\$700) to be paid "when the building is complete, and when all the drawings and specifications have been returned to Chisolm & Green, architects; *provided*, that in case of the final payment a certificate shall be obtained from and signed by said Chisolm & Green, architects, to the effect that the work [is] done in strict accordance with the drawings and specifications, and that they consider the payment properly due." The contract contained, also, these provisions: (3.) "Should the proprietor, at any time during the progress of said work, require any alterations of, deviations from, additions to, or omissions in the contract, he shall have the right and power to make such change or changes, and the same shall in no wise injuriously affect or make void the contract; but the difference for work omitted shall be deducted from the amount of the contract, by a fair and reasonable valuation, and for additional work required in alterations the amount based upon the same prices at which the contract is taken shall be agreed upon before commencing additions, as provided and hereinafter set forth in article 6; and such agreement shall also state the extension of time, if any, which is to be granted by reason thereof." (6.) "No new work of any description done on the premises, or any work of any kind whatever, shall be considered as extra, unless a separate estimate in writing for the same, before its commencement, shall have been submitted by the contractors to the proprietor, and his signature thereto obtained; and the contractors shall demand payment for such work immediately it is done."

The defendants demurred to the 4th count of the complaint as amended, (1) because it did not allege that the plaintiffs had obtained the certificate of the architects, which was necessary before the last installment of the agreed price could be demanded; (2) because it was not averred that the work was done according to the plans and specifications furnished by the architects, under their personal supervision, and to their satisfaction, as required by the terms of the written contract. The court overruled this demurrer, and the defendants then pleaded to the entire

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complaint, (1) not indebted; (2) payment; (3) set-off; (4) recoupment, (1) \$300 on account of the imperfect and defective workmanship and materials, and (2) \$164 as damages for delay in the failure to complete the house within the time specified in the contract; (5) that plaintiffs have never procured the certificate of the architects as to the proper completion of the work. They also pleaded to the 2d count, (6) that plaintiffs have never procured the certificate of the architects as to the proper completion of the work, and (7), to the 3d count, that no estimate in writing for any extra work was ever submitted to and signed by the defendants, as required by the written contract, and denied that they ever ordered any extra work, or promised to pay for any.

The plaintiffs demurred to the 4th and 5th pleas, but their demurrer was overruled; and they then replied to said pleas, (1) that they had several times demanded the certificate, and the architects refused to give it without any just cause; (2) that the defendants have accepted the work and materials, and are now in the enjoyment of the same; (3) that the written contract was varied by subsequent agreement between the parties, so as to require a greater amount of work and materials, and a longer time for the completion of the work; (4) that the written contract was waived by a subsequent parol agreement, which required a greater amount of work and a longer time for its completion. Additional replications to these pleas were, (1) that defendants have accepted the work and materials, and are now in the enjoyment of the same; (2) that the written contract was varied and modified by a subsequent agreement between the parties, which required a greater amount of work and materials, "and said written contract was thereby waived." The defendants, "by way of rejoinder to the 2d replication to their 5th plea, and the 1st replication to their 4th and 5th pleas, say, that they have never accepted said work, labor and materials so done and furnished by plaintiffs, except by moving into said house, which was constructed on defendants' land, before plaintiffs claimed to have completed the same, and they still occupy said building as a matter of necessity, the same being on their land." The plaintiffs demurred to this rejoinder, and their demurrer was sustained; and the cause was then tried, as the judgment-entry recites, "on issue joined as shown by the pleadings."

"On the trial," as the bill of exceptions states, "the plaintiffs' evidence tended to show that they had substantially complied with said written contract, which was read in evidence by them, and that they had done extra work at

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the instance of the defendant, and for which, after the execution of said written contract, before said extra work was done, he agreed to pay plaintiffs, amounting to \$164 in value. Plaintiffs' evidence showed that the work on said house was not completed until about January 21st, 1888; that defendant moved into the house, with their permission, in December, 1887, when only two rooms were finished, and still occupies said house as a residence; that said house, as completed by them, was worth from \$3,100 to \$3,300, and that all of said amount had been paid except about \$540. Plaintiffs evidence further tended to show that they were entitled to the certificate of said architects, Chisolm & Green, but it was wrongfully and capriciously withheld from them by said architects; also, that after said written contract was entered into, there was a subsequent parol contract between plaintiffs and defendant, by which the plans and specifications for the construction of said house were required to be altered, and that extra work was to be done on said house, for the doing of which it would take more time to complete said building than was provided for in said written contract, and that said plans and specifications were altered, and extra work done. The defendant's evidence tended to show that plaintiffs had not complied with the contract in the construction of the house; that much of the work was badly done; that inferior materials were used; and that plaintiffs had departed from the plans and specifications without authority, and had abandoned the work without completing it. It was further shown by the defendant that plaintiffs had never obtained the certificate of said architects, as required by said contract, and his evidence further tended to show that they were not entitled to it. Defendant denied that he had ever agreed to pay for anything extra, except to the amount of \$56 in value, and that he had ever accepted said work as completed, or as a performance of the contract. He admitted that he had moved into the house, by permission of plaintiffs, on the 13th December, 1887, when only two rooms were finished, and had since occupied it as a family residence. It was further shown that plaintiffs had continued to work on said house until January 21st, 1888. Defendant claimed to have overpaid plaintiffs \$200.30 more than the house is worth, after deducting for work omitted and defective, and damages for delay in construction."

"The court then charged the jury, *ex mero motu*, among other things, as follows: 'If the plaintiffs did not comply with the original contract sued on in this case, they are not entitled to recover upon it for the work done under it,

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unless you find from the evidence that a departure from the original plan and specifications was agreed on between the parties before it was made, and the work as done was performed in lieu of that originally contemplated; but it does not necessarily follow that plaintiffs in this action would not be entitled to recover for such work. If the plaintiffs did the amount of work they had agreed to do under the contract, and it was of value to, and accepted by defendants, although it may not have been done in strict compliance with the original plan and specifications, you may nevertheless, under the principles I have submitted to you, find that plaintiffs are entitled to recover, under the common counts of complaint, whatever the evidence shows the work which was done under the contract is reasonably worth, or rather the contract price for the work, less the difference in value of the work as done and what it would have been worth had it been done in compliance with the contract; but, in no event would they be entitled to recover more than the contract price, although the work so done may be of greater value than was paid for it under the contract. To allow plaintiffs to recover what the work was reasonably worth, regardless of the contract price for the work they were to do, might not be any punishment to them for a violation of the contract, if you find from the evidence that they violated it."

The defendants excepted to this charge, and also to the refusal of each of the following charges, which were asked in writing:

(1.) "If the jury believe from the evidence that the contract between plaintiffs and defendant was for the erection of a building upon the land of defendant, and that performance of the terms of the contract was to precede payment, and was the condition thereof, and that plaintiffs have substantially failed on their part to perform the contract, then plaintiffs can not recover in this action, notwithstanding defendant has chosen to occupy and enjoy the building."

(2.) "If the jury believe from the evidence that the final payment of the contract price of the building depended upon the plaintiffs obtaining the architects' certificate that the work and building was completed according to the contract, then plaintiffs can not recover in this action unless they show such certificate, or such facts are shown by the evidence as to convince the jury that such certificate is obstinately or unreasonably withheld."

(3.) "If the jury believe from the evidence that said building was not completed according to the contract, in a

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workmanlike manner, and that the last payment of seven hundred dollars was only to be made on the certificate of the architects, and such certificate is withheld because of the failure to complete the building in a workmanlike manner and according to the contract, then said certificate is not obstinately, unreasonably, or unjustly withheld, and without such certificate plaintiffs can not recover as to the last payment of seven hundred dollars."

(4.) "All persons entering into contracts are bound by the terms of the contract, and such contract is the law of the particular case; and if the plaintiffs in this case agreed to do the work strictly in accordance with the plans and specifications in said contract, then they are bound to comply with the requirements of such plans and specifications strictly; and unless the jury is satisfied that said plaintiffs have complied, then they can not recover without showing to the satisfaction of the jury that such failure to comply on plaintiffs' part has been expressly or impliedly waived by the defendant."

(5.) "The terms of all contracts, unless waived, must be strictly complied with, before any party thereto can have a right of action thereon; and the contract in this case stipulating that 'no new work of any description done on the premises, or any work of any kind whatsoever, shall be considered extra, unless a separate estimate in writing for the same, before its commencement, shall have been submitted by the contractors to the proprietor, and his signature obtained thereto;' then no charge for extra work under the contract in this case can be made, or judgment recovered therefor, unless said stipulation in said contract has been complied with by the contractor, or the same has been expressly waived or impliedly by the proprietor, the defendant in this cause."

(6.) "The mere fact that part performance of the contract has been beneficial to the defendant, is not enough to render the party benefitted liable to pay for the advantage. It must appear from the evidence that he has taken the benefit under circumstances sufficient to raise an implied promise to pay for the work done, notwithstanding the non-performance of the special contract. Therefore, in a case of building on land, under a contract which the builder fails to complete, or which he completes in a manner not conforming to the contract, so that the owner can not be charged with the contract price, the mere fact of the building remaining on the land, and the owner moving into and taking possession of it, and enjoying the fruits of the labor, is not such

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an acceptance as will alone imply a promise to pay for it; and without more, plaintiffs can not recover on the common counts in the complaint in this action."

(7.) "If the jury believe from the evidence that the last payment of seven hundred dollars depended upon the certificate of Chisolm & Green, the architects, that the work was completed in accordance with the drawings, plans and specifications, and that such certificate has not been obtained, nor unjustly, unreasonably, or collusively withheld, and they further find that defendant has paid on said contract twenty-six hundred dollars on the contract price of three thousand dollars, and they further find that plaintiffs have done extra work for which defendant is bound to pay under the stipulations of the contract, then the defendant is entitled to offset such amount of extra work with the three hundred dollars overpaid to such contractors under said contract."

(8.) "The plaintiffs are not entitled to recover on the common counts in this case, unless the jury believe from all the evidence that defendants accepted the work, and went into possession, and occupied and used the same, under such circumstances as will amount to an express or implied waiver of the failure upon the part of plaintiffs to perform said contract, and the mere fact of moving in and occupying the house, alone, is not sufficient to amount to an express or implied waiver."

(12.) "If the evidence shows that the plaintiff asked no further time to do extra work, defendant is entitled to reasonable damages for delay after November first, the time of completion as provided in contract."

(14.) "The burden of proof is on the plaintiffs to show performance of their contract, or a waiver by the defendant in this case."

(16.) "The use of a building which has been partially erected, though for the purpose for which it was intended, is not an acceptance of the work, or any part thereof; the duty to pass upon the work does not arise until its completion."

(18.) "A special contract for work must prevail, unless a departure from it has been so general as to render it impossible to connect the contract with the work."

(19.) "When a building is in process of construction under a special contract, and additions and alterations are to be made, the original contract is held to exist and be binding as far as it can be followed."

The rulings on the pleadings, the charge given, and the refusal of the charges asked, are assigned as error.

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BLACKWELL & KEITH, for appellants.—(1.) The court had no power to proceed with the trial of the case, while the order submitting it to arbitration was unrevoked.—1 Am. & Eng. Encyc. Law, 665. (2.) The demurrer to the 4th count of the complaint ought to have been sustained.—*Smith v. Briggs*, 3 Denio, 73; *D. & H. Canal Co. v. Coal Co.*, 50 N. Y. 265; *Butler v. Tucker*, 24 Wend. 447; *Smith v. Brady*, 17 N. Y. 173; *Wyckoff v. Meyers*, 44 N. Y. 143; *Wangler v. Swift*, 90 N. Y. 38. (3.) The demurrer to the rejoinder should have been overruled.—*Smith v. Brady*, 17 N. Y. 173; *Bozarth v. Dudley*, 43 Amer. Rep. 373; 72 Amer. Dec. 442. (4.) The 6th charge asked was correct, and it ought to have been given.—*Hartup v. Pittsburgh*, 97 Penn. St. 107; *Smith v. Brady*, 17 N. Y. 173; *Reed v. Board, &c.*, 3 Keyes, N. Y. 105; *Yeates v. Ballentine*, 56 Mo. 530; *Haysler v. Owen*, 61 Mo. 270; 88 Mo. 285. That the 8th charge asked for should have been given, see *Bozarth v. Dudley*, 43 Am. Rep. 373; 72 Am. Dec. 442. That the 16th charge should have been given, see *Yeates v. Ballentine*, 56 Mo. 530; *Haysler v. Owen*, 61 Mo. 270. As to the correctness of the 18th charge, see *Hummer v. Lockwood*, 3 G. Greene, Iowa, 90; and as to the 19th, see *McKinney v. Springer*, 3 Ind. 59.

BROTHERS, WILLETT & WILLETT, *contra*.—(1.) Nothing having been done under the submission for more than two terms, so far as the record shows, it was the duty of the court to proceed with the trial of the case, unless good cause was shown for a continuance.—Code, § 3221; *Bozeman v. Gilbert*, 1 Ala. 90; *Stone v. Dennis*, 3 Porter, 231; *Jones v. Harris*, 59 Miss. 214. A revocation of the submission is to be presumed in such case.—*Wilson v. Cross*, 7 Watts, 495; 2 Wend. 494; 47 Barb. 624; *Woodbury v. Proctor*, 9 Gray, Mass. 18; *Kimball v. Gilman*, 60 N. H. 54; 1 Am. & Eng. Encyc. Law, 666. (2.) Although the house may not have been built and completed according to the terms of the contract, yet the plaintiffs were entitled to recover under the common counts for work, labor and materials performed and furnished, if the house was accepted by the defendant, or was of substantial benefit to him.—*Thomas & Trott v. Ellis & Co.*, 4 Ala. 108; *Merriwether v. Taylor*, 15 Ala. 575; *Bell v. Teague*, 85 Ala. 211; *Hutchinson v. McCollum*, 23 Ala. 622; 2 Greenl. Ev., § 104, Redfield's edition; *Elliott v. Caldwell*, Lawyer's An. Rep., Oct. 14, 1890; *Handley v. Walker*, *Ib.*, July 23, 1890; Wood's Mayne on Damages, 302, note 1. The rule for estimating the damages in such cases, or amount of recovery, is laid down in *Crookshank v. Miller*, 2 G. Greene, Vol. 95.

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Iowa, 257; *Newman v. McGregor*, 5 Ohio, 357; *Haywood v. Leonard*, 2 Pick. 181; *Livingdale v. Livingston*, 10 John. N. Y. 36; *Harris v. Bernard*, 4 E. D. Smith, N. Y. 195; *Smith v. Proprietors*, 8 Pick. 177; *Bassett v. Sanborn*, 9 Cush. Mass. 58; *Kelly v. Bradford*, 33 Verm. 35; 7 East, 479; 2 C., M. & R. 547. (3.) These authorities show, also, that the production of the architects' certificate was not necessary to establish a right of recovery under the common counts; nor was it necessary under the special counts, if shown to have been capriciously withheld by them. (4.) The bill of exceptions does not purport to set out all the evidence adduced on the trial, and this court will make all necessary presumptions in favor of the correctness of the rulings of the court below. *McLemore v. Nuckolls*, 37 Ala. 662.

CLOPTON, J.—On August 24, 1888, the Circuit Court, in which the suit was originally instituted, made the following entry: "Came the parties by attorneys, and by agreement this cause is submitted to the arbitration of M. J. Miller and J. B. Goodwin, and they to call in a third man, whose award, when made according to law, to be made the judgment of this court in this case." When the case was called for trial in the City Court, to which it had been transferred under the statute, at the January term, 1891, defendants moved to refer it to the arbitrators under the order of the Circuit Court. The motion was overruled, and the City Court proceeded to try and determine the cause.

Section 3221 of the Code declares: "It is the duty of all courts to encourage the settlement of controversies pending before them, by a reference thereof to arbitrators, chosen by the parties or their attorneys; and on motion of the parties must make such order, and continue the cause for award; but such continuance must not extend beyond one term, unless for good cause shown, or by consent." While it is made the duty of the court, in pursuance of the legislative policy declared in the statute, to make an order of reference on motion of the parties, such order does not, under the statute, oust the court of jurisdiction of the case. It remains pending in court, subject to be called at each succeeding term for trial. The suspension for award is not indefinite. The statute places a limitation upon the discretion of the court as to continuing the cause: the continuance must not extend beyond one term, unless good cause be shown, or the parties consent. So far as the present record discloses, and we can look no further, no action was taken in execution of the order of reference,

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either by the arbitrators or by the parties ; and no cause shown when the case was called for trial, why it should longer be continued for award. Several terms having elapsed since the order of reference, and no award made, nor cause shown for a further continuance, it became the duty of the court, unless the parties consented to a further continuance, to disregard the order of reference, and proceed with the trial of the case.—*Shelby Iron Co. v. Cobb*, 55 Ala. 636.

The complaint contains several counts—one on a special contract for the erection of a dwelling-house, a common count for materials furnished and work and labor done, and a count for extra materials and extra work. The special contract contains a provision, that “no new work of any description done on the premises, or work of any kind whatsoever, shall be considered as extra, unless a separate estimate in writing for the same, before its commencement, shall have been submitted by the contractors to the proprietor, and his signature obtained thereto.” On the former appeal in the case (88 Ala. 367), this clause of the contract was construed. It was then held, that if no estimate in writing for the extra materials and work was submitted to defendant, and his signature thereto obtained, and no promise to pay for the same, no recovery could be had therefor ; but, if, during the progress of the work, alterations in the plan were made by mutual assent, and defendant promised to pay for the extra work required by the alterations, plaintiffs, if such work was worth more, considering materials and workmanship, than the work for which it was substituted, are entitled to recover the difference, although no written estimate was submitted and signed. The count contains an averment that, while the building was in course of erection, defendant promised to pay for the extra work and materials, and there is evidence tending to show such promise. Charge 5, requested by defendants, ignores the effect of this evidence, and excludes it from the consideration of the jury. The liability of defendant for the extra work and materials does not rest upon a waiver of the special condition of the contract, but upon a subsequent and distinct agreement to alter or modify the contract, and to pay the increased costs of such alteration or modification. The jury would have understood from the charge that they could not allow for the extra work and materials, unless defendant expressly or impliedly waived the condition, though he may have verbally promised to pay for the same. The charge is misleading.

The part of the general charge excepted to, and several Vol. 95.

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of the charges asked by defendants, relate to the liability of the owner of land for materials furnished and work done in the erection of a building thereon under a special contract, when the contractor has failed to perform it. This has been regarded as a vexed question, growing out of the fact that the building may add to the value of the land, and be of benefit to the owner, in connection with the practical difficulty of enforcing the right of rejection. Whatever contrariety of judicial views may exist, the rule, in such cases, has been long and well settled in this State. In *Thomas v. Ellis*, 4 Ala. 108, the rule is thus stated: "Indeed, nothing is more common than to permit a recovery upon an implied contract to pay the value of the labor, although it may not have amounted to a performance of the special contract; and this is always the rule when the defendant has accepted the work, or entered into possession and use of the house actually erected." The same doctrine has been re-asserted in the subsequent cases of *Merriwether v. Taylor*, 15 Ala. 735; *English v. Wilson*, 34 Ala. 201; *Bell v. Teague*, 85 Ala. 211. The doctrine practically rests upon the acceptance of the building by the owner of the land, not as finished according to the contract, but in its incomplete condition, and that in such condition it is of benefit to him. The acceptance need not be express; when there is no gross or fraudulent violation or abandonment of the contract, it may be inferred from the use and enjoyment of the property by the owner of the land upon which value has been conferred by the erection of the building. The charges relating to this matter asked by defendants are defective in this: they assert the proposition, that plaintiffs can not recover, even under the common counts, without showing a strict performance of the contract, or that an acceptance can not be inferred from merely moving into, taking possession, and using and enjoying the house. It may be that moving into the house before its completion, by consent of plaintiffs, would not, of itself, amount to an acceptance. But it is also shown that defendants remained in possession after the completion of the house, and have used and enjoyed it up to the time of trial. In such case, liability does not rest on strict performance of the provisions of the contract on the part of plaintiffs, or a waiver thereof by defendant, but upon an implied agreement, raised by the law, to pay for the labor done and materials furnished, which were of value and benefit, and accepted by him. On these principles, charges 1, 4, 6, 8, 14, and 16 asked by defendant, were properly refused.

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They predicate plaintiffs' right to recover, under any count of the complaint, on performance of the special contract, or a waiver of performance by defendants, or assume, as matter of law, that moving into the house, taking possession and enjoying the benefit, is not an acceptance. Besides charge 8 is argumentative. The question of acceptance was properly submitted to the jury. No question is raised as to the measure of recovery in such cases.

By the special contract, defendants agreed to pay for the erection of the house in installments as the work progressed; the fourth and last payment of seven hundred dollars to be made when the building was completed, and the drawings and specifications returned to the architects. The contract contains the provision, "that in case of the final payment, a certificate shall be obtained from and signed by Chisolm & Green, architects, to the effect that the work is done in strict accordance with drawings and specifications, and that they consider the payment as properly due; said certificate, however, in no way lessening the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings or specifications, either in execution or materials."

The fourth count declares specially on the contract, setting it out *in haec verba*. To this count a demurrer was interposed, assigning as the ground of objection, that it did not specifically aver that the certificate of the architects was obtained. It avers that plaintiffs "have complied with all the provisions of the contract on their part, and erected said building according to said contract." The count is substantially in the form of a complaint "on a dependent covenant or agreement," as prescribed by the Code. Under the statutory form, a mere statement of the contract, with a general averment that plaintiffs had complied with all its provisions on their part, and that defendant had failed to comply with specific provisions, is sufficient. These forms have the force of a statute.—*Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538.

The question as to the necessity of producing the certificate of the architects was also raised by charges 2 and 3 asked by defendant. Counsel for appellants have called our attention to cases decided by the New York Court of Appeals, in which it was held, under contracts containing similar provisions, that when the parties have made the production of the certificate of the architect, to the effect that

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the work was completely finished, a condition precedent to final payment, the plaintiff is bound to procure the certificate, if not impracticable to get it without fault on his part; and if he does get it, the defendant is bound to pay, unless he can show that it was obtained by fraud or mistake.—*Smith v. Brady*, 17 N. Y. 173; *Wyckoff v. Meyers*, 44 N. Y. 143; *Wangler v. Smith*, 90 N. Y. 38. Parties competent may fix the terms of their contract as they deem proper, and, in the absence of fraud or mistake, the court is not justified in displacing or altering them, though regarded imprudent or unwise. But whether, under the provisions of the contract, the obtainment of the architects' certificate is a condition precedent to final payment, we deem it unnecessary to decide. If conceded that it is requisite to entitle plaintiffs to recover the final payment under the counts declaring on the special contract; if the contract has not been performed, and defendant has accepted the house, the production of the certificate is not essential to recovery under the common counts on an implied contract to pay the value of the labor done and materials furnished. Charge 2 is too broad, and was properly refused, for the reason that it predicates the production of such certificate or proof of facts showing that it was obstinately or unreasonably withheld, as an element of plaintiffs' right to recover "in this action"—that is, under both the common and special counts. And charge 3 is obnoxious to the objection, that it submits to the jury the construction of the written contract, which it is the province and duty of the court to construe.—*Bernstein v. Humes*, 60 Ala. 582; *Claghorn v. Lingo*, 62 Ala. 230.

Charges 18 and 19 were properly refused, not only because argumentative in their nature, but also on the principle that, when the bill of exceptions does not set out all the evidence, if the legal propositions asserted by the charges might be met and avoided by proof of facts which would render the charges erroneous, this court will presume that such other facts were proved.—*Montg. & Eu. Railway Co. v. Kolb*, 73 Ala. 396; *McLemore v. Nuckolls*, 37 Ala. 662. The same observation applies to charge 12, which is to the effect, that if plaintiffs asked no further time to do extra work, defendant is entitled to reasonable damages for delay in finishing the building after the time of completion provided in the contract. If to do the extra work directed by defendant, and for which he promised to pay, necessarily required longer time to complete the building than allowed by the contract, a reasonable extension of the time will be implied,

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and defendant is not entitled to damages for the delay under such circumstances.

Affirmed.

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Action on Bond, assigning Breaches.

1. *Bond construed as contract of suretyship, not as guaranty.*—A bond signed jointly by several persons, one of whom had been appointed an agent and collector of a private corporation, by written contract made a part of the bond, reciting that for value received, and in consideration of said contract, they “hereby guarantee to” said corporation “the full and faithful performance of said contract, including all damages which may result to said company from any failure on the part of said S. [collector] to perform any of the provisions of said contract, to the amount of \$1,000; hereby waiving any necessity on the part of said company of instituting legal proceedings against said S. before having recourse on us,”—binds the other obligors as sureties for said S., and not as guarantors.

2. *When contract of suretyship becomes binding, and how revoked.* Such contract of suretyship, unlike a guaranty, does not require notice of acceptance, but becomes complete and binding on delivery; and having been delivered, one of the obligors can not afterwards revoke it as to himself, unless the right of revocation is expressly reserved in the writing.

3. *Charge submitting question of law to jury.*—If the court improperly submits to the jury the decision of a question of law, as if it was a question of fact, and the jury decides it as the court should have done, the error is without injury, and constitutes no ground of reversal.

4. *Release of one of several co-obligors.*—The release of one of several co-obligors operates to release the others only to the extent of his aliquot share of the whole liability.

5. *Discharge of surety by change of contract without his consent.*—When a surety binds himself for the faithful discharge by his principal of duties as collecting agent for a private corporation, the subsequent imposition of additional duties on the principal, which, though not within the ordinary duties of such agents, does not in any manner prevent or hinder the performance of his former duties, for a default in the performance of which only the surety is sought to be charged, does not discharge the surety, though done without his consent or knowledge.

6. *Same.*—A change in the contract between the principal and his employer, as to the amount of his compensation, does not discharge the surety, though made without his consent or knowledge, when it appears that the settlement between the parties, on which the default of the principal was ascertained, was based on the original contract; nor is the surety discharged because his principal, by subsequent agreement with the employer, without his knowledge or consent, was

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allowed to retain his compensation out of his weekly collections, instead of remitting his collections weekly to his employer, as required by the original contract of employment

7. *Discharge of surety, by indulgence to principal.*—Mere indulgence granted by the employer (or creditor) to the principal, or an agreement to give him further time to make good a default, if not supported by any new consideration which would make it binding as a contract, does not discharge the surety.

8. *Concealment of principal's dishonesty, or continuance in service after discovery, as discharge of surety.*—If the employer, discovering the dishonesty of the principal during the service, fails to give notice thereof to the surety, and continues the principal in the service, the surety is discharged from liability for subsequent defaults.

9. *Same, where employer is corporation.*—This principle applies to a private corporation, when it is shown that one of its agents, in the discharge of his duties, discovered the defalcation of the principal, failed to give notice thereof to the surety, though he had authority to do so, and continued the principal in the service; and the surety is discharged from liability for subsequent defaults.

APPEAL from the Circuit Court of Colbert.

Tried before the Hon. HENRY C. SPEAKE.

This action was brought by the Wheeler & Wilson Manufacturing Company, a corporation chartered under the laws of Connecticut, against R. F. Saint, A. J. Crossthwaite, C. M. Wright, J. F. Hall, and J. R. Spragins; was commenced on the 9th August, 1888, and was founded on the defendants' written contract under seal, which was dated September 19th, 1887, and in these words: "For value received, and in consideration of the within contract, R. F. Saint, of Leighton, Colbert county, Alabama," and the other defendants, mentioning their names and residences, "hereby guarantee to the Wheeler & Wilson Manufacturing Company, its successors or assigns, the full and faithful performance of the foregoing contract, including all damages which may result to the said company from any failure on the part of said R. F. Saint to perform any of the provisions of said agreement, to the amount of \$1,000; hereby waiving all necessity on the part of said company of instituting legal proceedings against said R. F. Saint, before having recourse on us; hereby waiving the benefit of all constitutional or statutory homestead or exemption laws now in force; further agreeing to pay plaintiff's attorney's fees, and all costs, should suit be necessary to enforce the collection of this bond. Witness our hands and seals," &c.

This contract, or bond, was written on the back of the contract therein referred to, by which said company, as party of the first part, employed said Saint, party of the second part, as its collector, which contract contained these provisions: "Section 1. The party of the first part agrees

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to employ the party of the second part as its collector. *Section 2.* The party of the second part is to engage in no other business, but to devote his time exclusively to collecting claims given him from time to time by the party of the first part. *Section 3.* The party of the second part agrees to remit to the party of the first part, on Saturday of each week, the full amount of all collections made by him. *Section 4.* All notes, leases and cash received by the party of the second part, on account of the party of the first part, shall be held and rendered strictly as the property of the said party of the first part, subject to their order and under their control. *Section 5.* In any matters where the duties of the party of the second part are not herein clearly defined, he shall obey any and all directions or instructions in relation thereto which shall from time to time be given him by the party of the first part. *Section 6.* The party of the second part is to receive, as full compensation for his services under this agreement, a salary of \$50.00 per month, and necessary travelling expenses; said salary and expenses to commence when party of second part reaches his territory and work commences; said party of the second part to furnish his own horse, and to go wherever ordered; all loss of time to be deducted. *Section 7.* This agreement may be terminated at the option of either party, in which case the party of the second part agrees to deliver to the party of the first part, at their office in Nashville, all of their property remaining in his possession or under his control, unless otherwise ordered by them in writing."

The complaint assigned, as breaches of the contract sued on, that said Saint had failed to pay over \$800, which he had collected under his contract of employment, and defendants had failed to pay the same on demand; 2d, that he had received "certain notes, claims and leases," describing them, which were received by him for and on account of the plaintiff, and which he had failed and refused to deliver or account for.

The defendants jointly pleaded "the general issue, in short by consent, with leave to give in evidence any matter that would be competent if specially pleaded." They also filed a special plea, alleging that plaintiff was a foreign corporation, and had not complied with constitutional and statutory provisions regulating its right to do business in this State, and that the contract sued on was signed and executed at Leighton, Colbert county, Alabama. The court sustained a demurrer to this plea. The defendant Crossthwaite filed two special pleas, claiming that he was released and

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discharged, (1) because, "after said bond had been executed, and before the same was delivered, he notified plaintiff that he would not remain liable on said bond;" (2) because, "after said bond had been delivered, but before said Saint had entered on the discharge of his duties as collector under said contract, this defendant gave plaintiff written notice that he would not remain a surety on said bond, and demanded that his name be stricken from it, and he believed that this had been done, plaintiff having made no objection to this demand." The other sureties filed special pleas claiming that they were discharged by the release of Crossthwaite. The court sustained demurrers to each of these special pleas, but the same legal questions were presented by charges given and refused. All of the sureties joined in several special pleas, claiming that they were released and discharged from liability, (1) because of several changes made in the contract between the corporation and Saint, without their knowledge or consent, by which his duties were increased, which changes were specified in the pleas, and are stated in substance in the opinion; (2) by indulgence granted to Saint, from time to time, without their knowledge or consent, instead of requiring him to pay over his collections at the stated times specified in the contract; and (3) by the continuance of Saint in the service, and placing notes and accounts in his hands for collection, after plaintiff had discovered a defalcation on his part, and without notifying the sureties of such defalcation. Demurrers were sustained to some of these pleas, and issue was joined on the others; but the same legal questions, in substance, were presented by charges given and refused.

The bill of exceptions purports to set out "all the evidence bearing on the questions raised to which exceptions were reserved," but it is unnecessary to state it, or the portions of it to which exceptions were reserved. On this evidence, the court gave a charge to the jury, to portions of which exceptions were reserved by the defendants, as follows: (1) "If the jury find that Saint, as a part of his collections, lifted sewing-machines and sold them, then he would be responsible for the proceeds arising from the sales of such machines, as a part of such collections. This principle applies to Saint; and so far as he is concerned, the verdict of the jury must be against him, for the amount collected, and remitted or accounted for, with interest." (2.) "When plaintiff introduces in evidence the written guaranty sued on, and further shows by proof the amount of Saint's default, then plaintiff is entitled to recover of his

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sureties the same sum it would be entitled to recover of Saint, unless they show by proof that they are not liable therefor." (3.) "If, however, the jury believe from the evidence that the guaranty was delivered to plaintiff before they had any notice of the withdrawal of his name by Crossthwaite, and further that Crossthwaite did withdraw his name from the guaranty, then the other sureties are not[?] discharged, only to the extent that Crossthwaite's share of the default as a surety would be."

The defendants requested charges in writing, numbered from 4 to 24, and excepted to their refusal, as follows :

(4.) "Under the contract between plaintiff and Saint, said Saint was to remit to plaintiff, on Saturday of each week, the full amount of all collections made by him; and his sureties, Hall, Wright, Crossthwaite and Spragins, had the right to insist on that part of the contract; and if the jury believe from the evidence that plaintiff and Saint changed that part of the contract, and plaintiff agreed for Saint to retain from his collections the amount of his salary and expenses, this was a change of the contract, and plaintiff can not recover against the sureties in this suit."

(5.) "If the jury believe from the evidence that, in February, 1888, Saint had only used \$50 or \$60 of the plaintiff's money, and that he notified plaintiff he was short that amount, then it was plaintiff's duty to notify the sureties, Wright, Crossthwaite, Hall and Spragins; and if plaintiff failed to notify them of such fact, plaintiff can not recover against these sureties for any defalcation of Saint after that time."

(6.) "If the jury believe from the evidence that Crossthwaite was released from the bond after it was signed by the other sureties, and such release was made or consented to by plaintiff, and plaintiff did not notify the other sureties of such release, then I charge you that the plaintiff can not recover in this action against any of the sureties."

(7.) "If the jury believe from the evidence that Crossthwaite was released from the bond or guaranty after the other sureties, Wright, Hall and Spragins, had signed it, then such release was a material change in the contract; and if you further believe from the evidence that such change was made without the knowledge and consent of Wright, Hall and Spragins, then the plaintiff can not recover against them."

(8.) "If the jury believe from the evidence that Crossthwaite was released from the bond or guaranty by the plaintiff, after Wright, Hall and Spragins had signed the bond, and without their knowledge and consent, then the plaintiff

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can not recover against the sureties, Crossthwaite, Wright, Hall and Spragins, and they should so find."

(9.) "If the jury believe from the evidence that in February, 1888, the plaintiff had notice that defendant Saint had collected money for it which he had converted to his own use, then it was the duty of the plaintiff to notify Wright, Hall, Crossthwaite and Spragins, his sureties, and if it failed to notify them, the plaintiff can not recover against said sureties for money collected and appropriated to his own use after that time."

(10.) "If the jury believe from the evidence that the plaintiff and defendant Saint materially changed the original contract, after the execution by the sureties of the bond sued on, without the consent of the sureties, then the plaintiff can not recover against the sureties, Wright, Crossthwaite, Hall and Spragins."

(11.) "If the jury believe from the evidence that the plaintiff and defendant Saint changed the contract, after the defendants Wright, Crossthwaite, Hall and Spragins had signed the bond, and that by such change additional duties were demanded and required of Saint, and that such duties increased the liability of the sureties; then plaintiff can not recover against them."

(12.) "Under the contract between plaintiff and R. F. Saint, said Saint was to remit to the plaintiff, on Saturday of each week, the full amount of all collections made by him; and I charge you that Hall, Wright, Crossthwaite and Spragins had the right to insist on that part of the contract, as well as the other parts of the contract; and if you believe from the evidence that the plaintiff and Saint changed that part of the contract, so as to materially affect the liability of the said sureties, then the plaintiff can not recover in this suit against said Wright, Crossthwaite, Hall and Spragins, and you should so find."

(13.) "Wright, Hall, Crossthwaite and Spragins are sureties of the defendant Saint, and are sued as such. The contract of surety imports entire good faith and confidence between the parties in regard to the whole transaction; and if the plaintiff knew of any fact or circumstance which was calculated to affect materially the liability of the sureties, it was its duty to notify the sureties; and if you believe from the evidence that the plaintiff knew of such facts, and failed to communicate it to the sureties, the plaintiff can not recover for any defalcation of Saint after it came in possession of such facts."

(14.) "Under the contract between R. F. Saint and the

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Wheeler & Wilson Manufacturing Company, Saint was employed as a collector for the plaintiff, and was to engage in no other business for plaintiff, but to devote his time exclusively to collecting claims given him by the plaintiff. Now, if the jury believe from the evidence that, after this contract had been made, and the bond sued on in this case had been executed, R. F. Saint, under the instructions of the plaintiff, sold sewing-machines for the plaintiff, and that this was done without the knowledge or consent of the guarantors on said bond, and that such other duties increased the sureties' risk, and that it was done without their knowledge or consent, then you must find a verdict in favor of the defendants C. M. Wright, A. J. Crossthwaite, J. F. Hall and James R. Spragins."

(15.) "If the jury believe from the evidence that the plaintiff and Saint altered and changed the contract, and the defendant Saint was authorized to sell and discount notes which the plaintiff had put in his hands under said contract, and such change was made without the consent of the sureties, then the plaintiff can not recover against Wright, Crossthwaite, Hall and Spragins, and they shall so find."

(16.) "Any material change in the contract between Saint and the plaintiff, without the sureties' consent, would discharge all of Saint's sureties from liability in this suit, whether such change was beneficial to them or not. The reason of this is, the sureties had the right to rest on the terms of their contract; and if you believe from the evidence there was such change in the contract between Saint and the plaintiff, your verdict should be for the defendants Hall, Wright, Crossthwaite and Spragins."

(17.) "If the jury believe from the evidence that plaintiff, after discovering that Saint had been guilty of converting to his own use money belonging to it, permitted Saint to continue to collect other money, without letting his sureties know such fact, then the plaintiff can not recover for any defalcation of said Saint after such notice to the plaintiff."

(18.) "If the jury believe from the evidence that, after the bond had been executed, A. J. Crossthwaite notified the plaintiff to erase his name from the bond, and that plaintiff received this notice before it had delivered the notes and accounts to Saint for collection, and that plaintiff did not notify the other sureties on the bond that Crossthwaite had withdrawn from the bond; then the plaintiff can not recover against any of the sureties on the bond."

(19.) "If the jury believe from the evidence that the

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plaintiff required A. F. Saint to sell sewing-machines and collect the money for such sales, that was a change of the contract, which the defendants C. M. Wright, A. J. Crossthwaite, J. F. Hall and James R. Spragins guaranteed performance of; and if you believe such change in the contract was made without the knowledge or consent of these defendants, the plaintiff can not recover against them in this suit."

(20.) "The contract of suretyship must be strictly construed in favor of the surety. His obligation is voluntary, without any consideration moving to him, without benefit to him, entered into for the accommodation of his principal, and generally also for that of the obligee, and courts see to it that his liabilities thus incurred are not enlarged beyond the strict letter of his undertaking. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. His contract can not be changed in any respect; whether the alteration is or is not to his benefit, is not open to inquiry."

(21.) "If the jury believe from the evidence that Saint gave notice to W. W. Walls, agent of plaintiff, that he had collected money, and had not remitted it according to the requirements of his contract with the plaintiff, and that Walls agreed with him that he could settle it with his salary in the future, and that Walls had authority to make this agreement; then that was a change in the contract, and released Saint's sureties."

(22.) "If the jury believe from the evidence that the plaintiff instructed Saint, by letter or otherwise, that he could retain from his collections the amount of his wages and expenses, this was a change of the contract; and if you further believe from the evidence that the change was made without the knowledge or consent of the sureties, Hall, Wright, Crossthwaite and Spragins, your verdict should be for the defendants, Hall, Wright, Crossthwaite and Spragins."

(23.) "If the jury believe from the evidence that, after the bond had been executed and forwarded to the plaintiff, A. J. Crossthwaite notified the plaintiff to erase his name from the bond, and that plaintiff received the notice before Saint had begun work for the plaintiff, and before it had delivered to Saint the notes and accounts for collection, then the plaintiff can not recover against Crossthwaite in this suit, and you must so find."

(24.) "Any material change in the contract between the plaintiff and Saint, after the bond had been executed by the

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other defendants, without their knowledge or consent, relieves the defendants Wright, Crossthwaite, Hall and Spragins from liability on the bond, although such change might have been intended for their benefit."

The rulings on the pleadings and evidence, the charges given, and the refusal of the charges asked, are assigned as error.

KIRK & ALMON, for appellants.—(1.) Sureties have the right to stand on the strict letter of their contract, and any alteration of the contract between their principal and the creditor, made without their knowledge and consent, discharges them from further liability, whether the change be injurious to them or not.—*City Council v. Hughes*, 65 Ala. 201; *Wiley v. Hightower*, 74 Texas, 306; *Plow Co. v. Walmsley*, Ind., 11 N. E. Rep. 232; 27 Amer. 404; Brandt on Suretyship, § 121; 1 Brick. Digest, 377, §§ 34-36; 3 *Ib.* 145, §§ 58-61; 1 Parsons on Contr., 3d ed., 504, note. (2.) While the sureties were discharged by the changes made in the contract without their knowledge or consent, the principal remained bound for his own default notwithstanding the changes.—3 Wait's Actions & Def. 231, § 5; *Life Ins. Co. v. Randall*, 71 Ala. 220; *Railroad Co. v. Brewer*, 76 Ala. 135; *Anderson v. Bellenger & Ralls*, 87 Ala. 334; 31 Am. Rep. 616; 2 Brick. Digest, 374, § 18. Therefore, the second affirmative charge of the court was erroneous. (3.) The release of Crossthwaite discharged the other sureties from liability. *Anderson v. Bellenger & Ralls*, 87 Ala. 334, and authorities there cited; 69 U. S. 219. (4.) The relation of principal and surety requires the utmost good faith on the part of the principal, and on the part of the creditor; and it was the duty of the creditor, on discovering any dishonesty or defalcation on the part of Saint, at once to notify the sureties of the fact.—*Newark v. Stout*, 52 N. J. L. 35; 27 Am. Rep. 404; *Evans v. Lawton*, Amer. Digest, 1888, p. 608, § 22; U. S. Digest, 1890, vol. 5, 1722, § 16; 63 Ala. 424; Brandt, S. & G. § 368; *Phillips v. Foxall*, L. R. 7 Q. B. 666; 21 Am. Rep. 624.

JAS. JACKSON, and ROULHAC & NATHAN, *contra*.—(1.) Crossthwaite was not released by his notice to the company that he would no longer be bound. He did not reserve the right to withdraw, and the company did not agree to release him. *Calvert v. Gordon*, 3 Man. & Ry. 224; 2 Simons, 253; 4 Russ. Eng. Ch. 581; Brandt on Suretyship & Guaranty, 159, § 113. (2.) If Crossthwaite had been released, the other sureties would have only been released thereby, as the court in—
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structed the jury, to the extent of his aliquot part of the debt.—*Brandt, S. & G. § 383; Jemison v. Governor, 47 Ala. 390; State v. Matson, 44 Mo. 315; Schock v. Miller, 10 Penn. St. 401; Klingensmith v. Klingensmith, 31 Penn. St. 460; Alford v. Baxter, 36 Vt. 158.* (3.) The defendants are sought to be charged for the defalcations of Saint under the terms of the original contract, and none of the alleged changes in the contract affected that liability. (4.) The creditor is not bound to active diligence against the principal, but may forbear the prosecution of his claim, and remain inactive, reposing on the faith of his security.—*McShane v. Howard Bank, 10 Lawyer's Ann. Rep. 552; Sasser v. Young, 6 Gill & J. 247; 37 Md. 502.* (5.) The plaintiff was not bound to give notice to the sureties of their principal's default.—*Canal Co. v. Van Vorst, 21 N. J. L. 100-16; Railroad Co. v. Schaeffer, 59 Penn. St. 356-82; Forrester v. State, 46 Md. 154.* It is the duty of the surety to see that his principal pays. *Watkins v. Worthington, 2 Bland, 530.* (6.) The retention of the principal in the employment by the creditor, after knowledge of a default, does not discharge the surety. *Jones v. United States, 18 Wall. 662; Canal Co. v. Van Vorst, 21 N. J. L. 100; Railroad Co. v. Schaeffer, 59 Penn. St. 356.*

McCLELLAN, J.—The contract sued on is not a guaranty, but one of suretyship. Crossthwaite and the other defendants, who undertake that Saint shall faithfully perform his contract with the company, are sureties of Saint, and not guarantors. The distinction between the two classes of undertakings is often shadowy, and often not observed by judges and text-writers; but that there is a substantive distinction, involving not infrequently important consequences, is, of course, not to be doubted. It seems to lie in this: that when the sponsors for another assume a primary and direct liability, whether conditional or not in the sense of being immediate or postponed till some subsequent occurrence, to the creditor, they are sureties; but when this responsibility is secondary and collateral to that of the principal, they are guarantors. Or, as otherwise stated, if they undertake to pay money, or do any other act, in the event their principal fails therein, they are sureties; but, if they assume the performance only in the event the principal is unable to perform, they are guarantors. Or, yet another and more concise statement, a surety is one who undertakes to pay if the debtor do not; a guarantor, if the debtor can not; the first is sponsor, absolutely and directly, for the principal's acts, the latter only for the principal's ability

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to do the act: "the one is the insurer of the debt, the other an insurer of the solvency of the debtor." This is the essential distinction. There is another going as well to its form. The contract of suretyship is the joint and several contract of the principal and surety. "The contract of the guarantor in his own separate undertaking, in which the principal does not join." Indeed, it has been held, pretermittin all other considerations, that no contract joined in by the debtor and another can be one of guaranty on the part of the latter (*McMillan v. Bull's Head Bank*, 32 Ind. 11; s. c., 10 Law Reg., and notes, 435), though we apprehend that a case might be put involving only secondary liability on the sponsors, though the undertaking be signed also by the principal. However that may be, it is certain that in most cases the joint execution of a contract by the principal and another operates to exclude the idea of a guaranty, and that in all cases such fact is an index pointing to suretyship. See Brandt on Suretyship & Guaranty, §§ 1 and 2; 9 Amer. & Eng. Encyc. of Law. p. 68; *Marberger v. Potts*, 4 Harris, 9; *Allan v. Hubert*, 13 Wright, 259; *Reigart v. White*, 2 P. F. Smith, 438; *Kramph's Ex'r v. Hatz's Ex'r*, 2 P. F. Smith, 525; *Birdsoll v. Hencock*, 18 Law. Reg. 751, and notes; *Hartman v. Nat. Bank*, 103 Pa. St. 581; *Courtis v. Dennis*, 7 Metc. (Mass.) 510; *Kearnes v. Montgomery*, 4 W. Va. 29; *Walker v. Forbes*, 25 Ala. 139.

Applying these principles to the bond sued on, the conclusion must be that it is not a guaranty but a suretyship on the part of Crossthwaite, Wright, Hall and Spraggins. It is not their separate undertaking, but the principal also executes it. While they employ the word "guarantee," they directly obligate themselves along with Saint to pay, absolutely and wholly irrespective of Saint's solvency or insolvency, all damages which may result to the obligee from his default. Not only so, but they expressly stipulate that the company need not exhaust its remedies against Saint before proceeding against them. It is, in other words, and in short, a primary undertaking on their part, not secondary and collateral, to pay to the company in the event of Saint's failure, and not an undertaking to pay only in the event of Saint's default and inability to pay. They are sureties of Saint, and not his guarantors, and their rights depend upon the law applicable to the former relation, and not upon the law controlling the latter.

2. One of the important differences in the operation, effect and discharge of the two contracts finds illustration in this case. The undertaking of guaranty in a case like this is

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primarily an offer, and does not become a binding obligation until it is accepted, and notice of acceptance has been given to the guarantor. Till this has been done, it can not be said that there has been that meeting of the minds of the parties which is essential to all contracts.—*Davis Sewing Machine Co. v. Richards*, 115 U. S. 524; *Walker v. Forbes*, 25 Ala. 139. Being thus a mere offer, it may be recalled, as of course, at any time before notice of acceptance. Indeed, there are authorities which hold that, even after acceptance and notice thereof, the guarantor may revoke it by notice that he will be no longer bound, unless he has received a continuing or independent consideration which he does not renounce, or unless the guarantee has acted upon it in such way as that revocation would be inequitable and to his detriment; and, in cases of continuing guaranty, the effect of such revocation is to confine the guarantor's liability to past transactions.—2 *Parsons on Contracts*, 30; *Allen v. Kenning*, 9 Bing. 618; *Offord v. Davies*, 12 C. B., N. S. 748; *Tischler v. Hofheimer*, 4 S. E. Rep. 370.

All this is otherwise with respect to the contract of surety. He is bound originally in all respects upon the same footing as the principal. His is not an offer depending for efficacy upon acceptance, but an absolute contract depending for efficacy upon complete execution, and its execution is completed by delivery. From that moment his liability continues until discharged in accordance with stipulations of the instrument, or by some unauthorized act or omission of the obligee violative of his rights under the instrument, or by a valid release. Nothing that he can do outside of the letter of the bond can free him from the duties and liabilities it imposes. He can not assert the right to revoke, unless the right is therein nominated. As was said by the English court, "if he desired to have the right to terminate his suretyship on notice, he should have so specified in his contract."—*Calvert v. Gordon*, 3 Man. & Ry. 124; *Brandt Suretyship & Guar.*, §§ 113, 114.

3. The evidence here as to the release of Crossthwaite tends to show no more than this: that after the bond had been delivered to plaintiff, and after its officers had advised Saint that they were ready for him to enter on the discharge of his duties under the contract secured by the bond, he (C.) requested plaintiff to take his name off the paper. No assent to this request is shown, but only an inquiry on the part of plaintiff as to C.'s reasons for desiring to be released. It would seem that the court itself should have decided that these facts did not release Crossthwaite; but the question

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appears to have been submitted to the jury. If this submission, or any of the instructions accompanying it, was erroneous, no injury resulted to defendants, since the jury determined the point against the alleged release, as the court should have done, assuming it to have been a question of law. On the other hand, if it were a question for the jury, it is to be presumed they were properly instructed as to the rules of law which should guide them to its solution, as no exceptions were reserved in that regard.

4. The exceptions which were reserved on this part of the case are to charges given, and to the refusal to give charges asked by defendants, declaratory of the effect which the discharge of Crossthwaite, *if the jury found he had been discharged*, would have upon the liability of his co-sureties. As the jury found expressly that he had not been discharged, these exceptions present mere abstractions not necessary to be decided. We have no doubt, however, but that the law in this respect was correctly declared by the court to be, that the release of Crossthwaite operated to release the other sureties only to the extent of his aliquot share of the liability.—Brandt Sur. & Guar., § 383; Burge on Suretyship, 386; *Klingensmith v. Klingensmith*, 31 Pa. St. 460; *Ex parte Gifford*, 6 Ves. 805; *Shock v. Midler*, 10 Pa. St. 401; *Currier v. Baker*, 51 N. H. 613; *Governor v. Jemison*, 47 Ala. 390.

5. The sureties of Saint insisted on the trial below that they were discharged from all liability on the bond by reason of certain alleged changes made in the original contract between their principal and the company by the parties thereto, after they became sureties for its faithful performance, and without their knowledge, consent or ratification. It is not pretended that the paper writing evidencing this contract was ever altered in any respect, but that its terms were changed by subsequent parol agreements, in the following respects, among others to be presently considered: *first*, that under this contract, which constituted Saint a collector only for the company, he was instructed and required to take up and resell sewing-machines, when he found the notes for the purchase-money of the same, and which were in his hands for collection, could not be collected; and, *second*, that he was authorized to discount or sell the notes placed in his hands for collection, when the same could not be otherwise realized upon. Nothing is claimed in this action on account of Saint's misconduct in respect of any property thus taken up or resold, or of any note discounted by him, or with respect to the proceeds of any such sale or discount. If

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these duties were such as usually devolved upon a collector for a sewing-machine company—as to which there is no evidence in this record, and no necessity for any under the present complaint—it may be that Saint's sureties would be responsible for their faithful performance on his part to the same extent as for money collected on notes in his hands. *Bank v. Zeigler*, 49 Mich. 157. However that may be, the fact that they were imposed upon him, assuming they were not covered by his contract, and hence were in addition to those assumed by the other defendants, can not relieve his sureties from liability with respect to those which were imposed by the contract, unless the imposition of these new duties and their performance by Saint rendered impossible, or materially hindered or impeded, the proper and faithful performance of the service originally undertaken. There is no evidence here that these new and additional duties interfered with the collection of notes placed in his hands for that purpose; nor is any claim made against his sureties on account of any failure to collect such notes. But the *gravamen* of the action is, that he (1) did collect these notes, and converted the proceeds to his own use; or (2) that he failed to deliver such notes to the company on the termination of his employment. We are unable to conceive how the fact that he had other property and funds—machines and the proceeds of discounted notes—in his possession, could have hindered or impeded him in the accounting for funds collected or notes remaining in his hands, or could in any degree have conduced to his conversion of such funds or notes. To the contrary, it would seem, in all reason, that the possession of this other property and these other funds, out of which he might have met the necessities which presumably induced his malversations, would have lessened the chances of misappropriation of the funds and property for which his sureties were responsible, and thus have lessened, instead of increased, their exposure to liability. We are very clear to the conclusion, that the imposition of these new duties not covered by the contract did not discharge the sureties with respect to those embraced in the contract, and as to which no change, in the particulars we are considering, was attempted.—*City of New York v. Kelly*, 98 N. Y. 467; *State of New York v. Vilas*, 36 N. Y. 459; *Ins. Co. v. Potter*, 4 Mo. App. 494; *Commonwealth v. Homes*, 25 Gratt. (Va.) 771; *Savings Bank v. Trauble*, 42 Am. Rep. 402; *Gaussen v. United States*, 97 U. S. 584; *Jones v. United States*, 18 Wall. 662; *Ryan v. Morton*, 65 Tex. 258; *Nat. Bank v.*

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Gerke, 6 Am. St. Rep. 453, and note 458; *Bank v. Zeigler*, 49 Mich. 157.

6. The sureties further defended on the ground that the contract between Saint and the company was changed, without their knowledge or assent, by a subsequent parol agreement entered into by their principal and Walls, representing the company, whereby Saint's compensation was to be reduced from fifty dollars per month to nine dollars per week. There was evidence of such agreement, but none that it was supported by a consideration, or that it was approved by plaintiff. And it appears from other evidence that all of Wall's contracts were subject to approval or rejection by other officers of the corporation, and that plaintiff settled with Saint on a basis as to compensation of fifty dollars per month. We think, on these facts, this defense is without merit.—*Steele v. Mills*, 68 Iowa, 406.

Equally untenable, in our opinion, is the defense which proceeds on the ground that the instruction of plaintiff to Saint to retain his salary and expenses out of collections made by him was a material change of that provision of the contract which required him to remit to the company on the 1st day of each week the amount collected up to that day. The contract provided for Saint's compensation and expenses, but was silent as to the manner of payment. The method of payment thus adopted tended to decrease the risks of the sureties, as affording less occasion for conversion by Saint than had payments to him been made only at the end of each month.

7. It is well settled, that mere indulgence of the creditor to the principal, the mere forbearance to take steps to enforce a liability upon default, or even an understanding between them looking to payment of the deficit presently due at some time in the future, which does not, for the want of a consideration to support it, or other infirmity, prevent the creditor from immediately demanding payment, will not discharge the surety. Hence, what took place between Walls and Saint in February, 1888, in regard to allowing the latter further time to make good the sum he had therefore converted, afforded no defense to the sureties with respect to the sum then due.—3 Brick. Dig., p. 715, §§36-43; 9 Amer. & Eng. Encyc. of Law, p. 83, n. 4; *Canal Co. v. VanVorst*, 21 N. J. L. 100.

8. The sureties, however, on another aspect of the transaction last above referred to between Saint and Walls, predicate a defense going to the amount of their liability. They insist that Saint was at that time a defaulter by em-
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bezzlement; that Walls knew this fact, and, without giving any notice of it to them, he, acting for the company, continued Saint in its employment, and committed other funds to him which were also converted; and that this action of Walls discharged them from all liability for funds thus converted after he knew of Saint's dishonesty. The general principle, here relied on, finds abundant support in the authorities. In the leading case of *Phillips v. Foxall*, Law Rep. 7 Q. B. 666, the proposition in thus stated by Quiln, J.; "We think that in a case of continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guaranty relates, and if, instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he can not afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service." And this proposition is rested upon considerations which, to our minds, are eminently satisfactory. Premising that had a default involving dishonesty, and occurring before the surety became bound, been known to the creditor, and concealed by him from the surety, the effect would have been to discharge the surety, a doctrine which appears to be well established, the court proceeds to declare the same result from a concealment of dishonesty pending a continuing guaranty, as follows: "One of the reasons usually given for the holding that such a concealment [at the time the surety enters into the obligation] would discharge the surety, is, that it is only reasonable to suppose that such a fact, if known to him, would necessarily have influenced his judgment as to whether he would enter into the contract or not; and in the same manner, it seems to us, equally reasonable to suppose that it never could have entered into the contemplation of the parties that, after the servant's dishonesty in the service had been discovered, the guaranty should continue to apply to his future conduct, when the master chose, for his own purposes, to continue the servant in his employ without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded continue to apply to it during its continuance, and until its termination." The citations directly supporting this conclusion are *quasi dicta*

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of Lord Redesdale in *Smith v. Bank of Scotland*, 1 Dow. 287, and of Malins, V. C., in *Burgess v. Eve*, Law Rep., 13 Eq. 450; but the case was subsequently followed in England and the United States, and nowhere abstractly doubted. We follow these authorities, and adopt their conclusions as sound in principle.—*Sanderson v. Aston*, Law Rep. 3 Exch. 73; Brandt on Sur. & Guar., § 368; *Roberts v. Donovan*, 70 Cal. 108; *C. C. & A. R. R. Co. Gow*, 59 Ga. 685; *A. & P. Tel. Co. v. Barnes*, 64 N. Y. 385; *Newark v. Stout*, 52 N. J. L. 35.

9. Indeed, the foregoing doctrine is not controverted in this case; but it is contended that it has no application as between a corporation, being the creditor, and the surety of one of its officers or employees. And there are not a few adjudged cases which support this view. The argument upon which this conclusion is reached is, that "corporations can act only by officers and agents. They do not guarantee to the sureties of one officer the fidelity of the others. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his (the principal's) infidelity, ought not in reason, and does not in law or equity, relieve the sureties from their responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank, or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound."—*Ft. W. & C. Railway Co. v. Shaeffer*, 59 Pa. St. 356; *Taylor v. Bank of Ky.*, 2 J. J. Marsh. 565; *McShane v. Howard Bank*, 10 Law. An. Rep. 552; Brandt on Sur. & Guar., § 369.

It is to be noted that these cases—and there may be others which follow them—hold, not only that where there is a conspiracy between officers of a corporation to embezzle its funds, the dereliction of neither officer will discharge the sureties of the other, but also where there is a negligent failure on the part of one such officer to give notice to the sureties of another of his dishonesty, and a continuance of the dishonest servant in the corporate service without the assent of his sureties given with a knowledge of the default, the sureties are not discharged from liability for subsequent deficits, though confessedly they would be were the creditor an individual or copartnership. It may be that the first position stated is sound. It would seem to be immaterial whether an original default results from the dishonesty of the principal alone, or conjointly from his

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and the dereliction of another corporate employe. The sureties are bound to answer for the results of any form of original dishonesty; that is what they insure against. It may be too, doubtless would be, that no concealment by a conspirator of the fact of the principal's original default, no continuance in the service by an officer of the corporation *in pari delicto* with the principal, would suffice to discharge the surety, since all of this is malversation participated in by the principal, and violative of the contract which the sureties have undertaken to see faithfully performed. Moreover, the acts and omissions of one agent of a corporation, in conspiracy with another to filch their common master, in furtherance of their nefarious purposes, are, in the nature of things, without authorization by implication or otherwise, and can in no just sense be said to be acts or omissions of the corporation. Upon this idea, it may be that where one officer, though not originally participating in the default of another, conceals that default from the sureties of his fellow-officer and from the company, for sinister purposes of his own, and not as representing his employer, or in his interest, and continues the defaulting officer in the service, the sureties would not be discharged as to subsequent deficits. Thus far we may go with the learned courts in which the cases we have cited were decided.

But even our conservatism in following adjudications of courts of acknowledged ability and learning can in no degree constrain us to adopt the second proposition stated above. We can not subscribe to the doctrine, that there is the radical difference insisted on, or any material difference in fact, between the efficacy of acts and omissions of an agent of a creditor corporation, having authority in the premises, on the one hand, and the acts and omissions of the agent of an individual creditor, or of the individual himself, on the other, in respect of condoning the defalcation of an employe, omitting notice to the employe's sureties, and continuing him in the service, to operate a release of the sureties as to subsequent deficits of the dishonest employe. No doctrine of the law is more familiar than that notice to an agent, within the scope of his agency, is notice to the principal; and this doctrine has in no connection been applied more frequently and uniformly than to corporations and their agents. Indeed, there is an absolute necessity in all cases for its application to corporations, since they act and can be dealt with only through agents. Notice to one agent of a corporation, with respect to a matter covered by his agency, must be as efficacious as to its directors or to its

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president, since these also are only agents, with larger powers and duties, it is true, but not more fully charged with respect to the particular thing than he whose authority is confined to that one thing. In the case at bar, Walls had authority to make the contract with Saint, subject to the approval of another agent of the corporation. He did in fact make it. This contract contained a provision for its termination by either party at pleasure. The evidence was that Walls had full supervision over Saint, and over all matters embraced in the contract made by Saint. It was at least a fair inference to be drawn by the jury, that he could terminate the employment either under the stipulation in the instrument, or for a violation of it by Saint, subject to the approval of the other officer or agent referred to. There is no ground to doubt but that to have given the sureties notice of Saint's default would have been in the line of his duty and authority. Equally clear it must be, that their assent to him to a continuance of Saint's employment would have bound them for the subsequent defalcation; and, on the other hand, it must be, that their dissent from such continuance communicated to him would have had the same effect as had it been given to any other officer of the creditor company. He had notice of the default. He received it as representing the company. In that capacity, he condoned it, made arrangements with Saint to make it good, continued the employment, and continued Saint's opportunities to embezzle the company's funds, on the supposed security for its re-imbursement afforded by the obligation of the sureties, who had contracted on the assumption of Saint's honesty, and were entitled to know of his dishonesty when it should develop, as a condition to their subsequent liability. There is no intimation of connivance or conspiracy on the part of Walls with Saint to defraud either the creditor or the sureties. What he did was doubtless done in good faith, and for the interest, as he supposed, of his employer. It was in the line of his employment. If his further duty was to report his action to another officer of the company, the presumption is that he made such a report; there is nothing in the record to rebut such presumption. We can not hesitate to affirm, on this state of the case, that what he did which ought not to have been done, and what he failed to do which ought to have been done, were the acts and omissions of the corporation, involving the same consequences in all respects as if the corporate entity had been capable of direct personal action, so to speak, and had

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acted as he did, or as if he himself, and not the Wheeler & Wilson Manufacturing Company, had been the creditor.

We suppose it would not be contended in any quarter that, if these sureties had in terms stipulated that, in case of Saint's default, notice to them and assent on their part should be a condition precedent to their liability for further defaults, they could be held without such notice and assent; and yet, under the doctrine announced in the cases cited, such a stipulation would be entirely nugatory, and the failure of every agent and officer, all with knowledge of the stipulation and of the default, to notify the sureties thereof, would avail them nothing. Yet it would manifestly be no more the duty of the corporation to give a notice so stipulated for than to give a notice made a part of the contract by the law of the land. And such doctrine, carried to its legitimate results, would defeat all corporate liability growing out of the contracts, acts and omissions of agents clothed with power and authority in the premises. That it is unsound is demonstrated not only in logic, but upon analogous authority. As we have seen, the English court in the leading case of *Phillips v. Foxall*, *supra*, which has never been called in question there or in this country, either as to the result or the reasoning upon which it was reached, supported the principle declared upon the same considerations which underlie the doctrine, that if an employer have knowledge of the previous dishonesty of a servant, and accept a guaranty for his future honesty without disclosing such knowledge to the surety, this is a fraud upon the latter, and he is not bound. Now, suppose an officer of a corporation charged with the duty of finding surety for another officer, knowing of such previous dishonesty on the part of such other officer, takes bond for his faithful and honest performance of the services contracted for without giving the surety notice of the prior dereliction, would not that omission of duty on his part stand upon the same plane before the law, and involve precisely the same consequences, as if the default had occurred after the surety has bound himself, and the officer had then failed to give him notice of it? If the corporation is not prejudiced by the omission in one instance, can it be in the other? If the corporation is responsible for the dereliction of its agent with respect to notice of a previous default, would it not also be responsible for its agent's failure to give notice of the subsequent default? There can, in our opinion, be but one answer to these questions. There can be no possible difference in the duty of the agent

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and the corporation's liability for its non-performance in the two cases. And the law is well settled, that the failure of the agent of a corporation to give notice of such previous dishonesty avoids the obligation of the sureties for future misconduct. Singularly enough, too, some of the cases holding this doctrine distinctly and broadly were decided by courts, those of Pennsylvania and Kentucky, which hold the contrary view as to notice of after-occurring embezzlement.—*Brandt on Sur. & Guar.*, §§ 365-368; *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 344; *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.), 23; *Franklin Bank v. Cooper*, 36 Me. 179; s. c., 39 Me. 542.

Our conclusion on this point is further supported by the cases of *C. C. & A. R. R. Co. v. Gow*, and *A. & P. Tel. Co. v. Barnes*, *supra*, which, without discussing this point, in effect hold that the omission of an officer of a corporation to notify a surety of the default of his principal in a case like this, and the continuance by such officer of the employment of the principal, will discharge the surety as to all defaults arising during the subsequent service. And in *Newark v. Stout*, 52 N. J. L. 35, the New Jersey court, while adhering generally to the doctrine we have been criticising, yet held that, if the default and dishonesty of a municipal officer be brought to the attention of the city council, which is clothed with the power to remove him, and he is allowed to continue in the service without notice to and assent on the part of the surety, the latter will be discharged from liability as to all subsequent defaults. It does not appear to have been so considered by that court, but it is manifest that this is a radical departure from the doctrine held by the Pennsylvania, Kentucky, Maryland and other courts, and relied on by appellee here; and goes strongly in support of the contrary rule, which we believe to be the sound one.

It is also to be noticed, that much reliance is had by the courts holding that a surety of one officer of a corporation is not discharged by the acts or omissions of another in the particulars under consideration, on cases decided by the Supreme Court of the United States in respect of sureties of public officers. Indeed, it would seem that this whole doctrine had its inception in this class of cases. This cannot but be considered an infirmative circumstance going to the soundness as authority of those cases which involve sureties of corporation officers. There is a palpable and manifest distinction between the two classes of cases bearing directly upon this question, which, while requiring the application of this rule to public officers on the grounds of public policy.

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and that *laches* should not be imputed to the government, does not require its application to officers of corporations.

We hold that if Walls, while acting for the corporation, and in the capacity of its agent, with respect to the matters and things involved in Saint's contract, received notice of such a conversion of its funds by Saint as amounted to embezzlement, or involved dishonesty, and, without imparting this knowledge to the sureties and receiving their assent thereto, continued him in the service, that the sureties are not liable for Saint's subsequent defaults. Charges 5, 9 and 7, requested for defendants, when referred to the evidence, were correct expositions of the law as we understand in this connection. The refusal of the court to give them involved error which must work a reversal of the case. Most of the other assignments of error are covered by the points considered in the first part of this opinion. Such of the assignments as are not discussed have been considered, and found to be without merit.

The judgment is reversed, and the cause remanded.

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Action on Promissory Notes, by Payee against Maker.

1. *Discharge of surety by extension of time to principal.*—An extension of the day of payment, granted by the creditor to the principal, and founded on a valuable consideration, discharges the surety, if made without his knowledge and consent; and the payment of interest in advance for the extended period, in consideration of the extension, is a valid consideration, though a partial payment after maturity is not.

APPEAL from the Circuit Court of Morgan.

Tried before the Hon. HENRY C. SPEAKE.

This action was brought by Thos. M. Scruggs, against Jno. F. Scott and H. S. Freeman, and was founded on the defendants' two promissory notes, one for \$520.33, and the other for \$2,081.32; each of said notes being dated January 4th, 1890, and payable six months after date, to the order of the plaintiff, at the First National Bank of Decatur. The action was commenced on the 21st March, 1891. The defendants jointly pleaded the general issue, and Freeman specially pleaded that he was only a surety on the notes, and was discharged by an extension of the day of payment

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granted by plaintiff to Scott, for valuable consideration, without his knowledge or consent. Issue was joined on each of these pleas.

On the trial, the plaintiff having read in evidence the notes sued on, the evidence introduced by the defendants showed these facts: On May 23d, 1889, the defendant Scruggs applied to Scott, the plaintiff, for a loan of \$3,000; and on Scott asking "what security he could give," said, "that he could give his own note, with Freeman as surety." Scott agreed to make the loan, and wrote out two notes, one for \$2,000, and one for \$1,000; to which notes Scott then signed his own name, and, taking them out of the office where he and Scruggs were, returned in a few minutes with Freeman's name attached. These notes were dated May 23d, 1889, and were payable to Scruggs' order, on the 1st January, 1890, at the First National Bank at Decatur; and Scruggs paid the money to Scott, deducting the interest in advance. About the time of the maturity of these notes, Scott applied to Scruggs for an extension of the debt, and Scruggs agreed to extend the day of payment for six months, if Scott would pay \$500 cash, and give new notes in renewal. Scott agreed to these terms, and proposed to take the new notes out and procure Freeman's signature; but Scruggs insisted that Freeman must come to his office and sign them. Scott then brought Freeman to the office, where they both signed the renewal notes, the notes now sued on; and Scott having paid the \$500, the new notes were delivered to Scruggs, and the old notes were thereupon delivered up and cancelled by tearing off the signatures. The evidence showed that, at the time of the execution of these new notes, no questions were asked, and nothing was said by any of the parties as to Freeman being only a surety for Scott. When these new notes matured, Scott again asked an extension, and after several letters had passed between him and Scruggs, the latter agreed to extend the debt for six months, if Scott would pay the interest for six months in advance. Scott agreed to this, and paid the interest as stipulated; and this suit was not brought until after the expiration of the six months. It was not controverted that this agreement was made without the knowledge or consent of Freeman.

On these facts, the court charged the jury, on request, that they must find for the plaintiff, against each of the defendants, if they believed the evidence. The defendants excepted to this charge, jointly and severally; and Freeman also excepted to the refusal of several charges asked by him in writing, as follows:

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(1.) "If the jury find that the defendant Freeman signed the notes which are the foundation of this suit solely as surety for the defendant Scott, and that this fact was known to the plaintiff at the time of the making of the notes; and if the jury also find that the plaintiff, without the knowledge or consent of the defendant Freeman, by an agreement between him and the defendant Scott, for a valuable consideration extended the time of the payment of the said notes for a definite time; then the defendant Freeman is discharged as surety, and the verdict must be in favor of the defendant Freeman."

(2.) "If the jury find that the defendant Scott paid to the plaintiff the whole or any part of the interest on the notes which are the foundation of this suit, in advance, as a consideration for the extension of the time of the payment of the said notes for a definite time, and that the plaintiff accepted the said payment, and in consideration thereof agreed to extend the time of the payment of the said notes for a definite time; such payment of the whole, or any part of the said interest in advance, was a valuable consideration, and sufficient to sustain the agreement for the extension of the payment of the said notes; and if the jury also find that the defendant Freeman was only a surety on the said notes, and that this agreement for the extension of the time of the payment of the notes was made without his knowledge or consent, then he is discharged as such surety, and their verdict must be in his favor."

(3.) "If a creditor, for a valuable consideration, makes an agreement with the principal debtor to extend the time of the payment of the debt, without the knowledge or consent of the surety, the surety is thereby discharged, no matter whether he has suffered any loss or damage by such extension or not."

(4.) "If the jury find that the defendant Freeman signed the notes which are the foundation of this suit, solely as the surety for the defendant Scott, and that Freeman signed the notes sued on under circumstances which, if followed up by Scruggs, would have brought knowledge of this fact to Scruggs; and if the jury also find that the plaintiff, without the knowledge or consent of the defendant Freeman, by an agreement between him and the defendant Scott, for a valuable consideration extended the time of the payment of the said notes for a definite time, then the defendant Freeman is discharged as surety, and their verdict must be in his favor."

(5.) "The jury may look at the circumstances attending

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the execution of the said notes sued on, to determine whether Scruggs did in fact know that Freeman was simply a surety on the notes."

6. "If the jury believe from the evidence that the original notes, which were surrendered when the notes sued on were executed, were signed by Freeman as surety; and if the jury further believe from the evidence that the notes sued on were given at the request of Scott, and that Freeman did not join in the request; then the mere execution of these last notes, in renewal of the first, in the absence of an express agreement to the contrary, would not change the relation of the parties existing prior to such new notes, so as to make Freeman a principal with Scott on the notes sued on."

(7.) "If the jury believe from the evidence that the notes sued on were given at the request of Scott, and that Freeman did not join in the request, then the mere execution of these last notes, in the absence of an express agreement to the contrary, would not change the relation of the parties existing prior thereto, so as to make Freeman a principal with Scott on the notes."

(8.) "If the jury find from the evidence that the notes sued on were simply a renewal of the loan to Scott by Scruggs, or a portion thereof, then the presumption is, in the absence of proof to the contrary, that the parties sustained the same relation to each other that existed at the time of the original notes."

(9.) "Although the notes sued on may on their face import that Scott and Freeman were co-makers, yet it is competent to show that Freeman did in fact sign the notes sued on simply as surety, and this fact may be shown by the testimony of the witnesses."

(10.) "Defendant Freeman requests the court to submit to the jury whether or not he was surety on the two notes sued upon, and whether that fact was known to the plaintiff at the time of the making of the notes."

The charges given, and the refusal of the several charges asked, are assigned as error, jointly and severally.

M. A. TYNG, and W. R. FRANCIS, for appellants.—If the time of payment is extended for a definite time, by a binding agreement between the creditor and the principal, without the consent of the surety, the latter is thereby discharged. 2 Brandt on Suretyship, §§ 342, 352; *Br. Bank of Mobile v. James*, 9 Ala. 949; *Haden v. Brown*, 18 Ala. 641; *M. & M. Railway Co. v. Brewer*, 76 Ala. 135, 142; *Cox v. M. & G. Railroad Co.*, 44 Ala. 611; *Stillwell v. Aaron*, 69 Mo. 539, or Vol. 95.

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33 Amer. Rep. 517; *Hollingsworth v. Tomlinson*, 12 S. E. Rep. 989; 2 Dan. Neg. Instruments, § 1317. It is not necessary that the fact of suretyship should appear on the face of the paper, when the creditor knows the fact at the time he grants the extension; and the relation between the parties may be shown by parol evidence.—2 Brandt, 375; 1 *Ib.* 29; *Greenough v. McClelland*, 2 Ell. & Ell. 424; *Pooley v. Harradine*, 7 El. & Bl. 431; *Br. Bank v. James*, 9 Ala. 949; *Walton v. Williams*, 44 Ala. 347; *Summerhill v. Tapp*, 52 Ala. 227. Whether plaintiff had knowledge of Freeman's suretyship was disputed, and the question should have been submitted to the jury.—*Hissong v. Railroad Co.*, 91 Ala. 514; *Sublett v. Hodges*, 88 Ala. 491; *Daniel v. Hardwick*, *Ib.* 557.

HARRIS & EYSTER, *contra*.—Whether Freeman was only surety for Scott on the original notes, and whether plaintiff knew that fact, are immaterial inquiries in this case. When the notes now sued on were given, nothing was said about the relation between Scott and Freeman, but the old notes were surrendered and cancelled, and the new notes taken under the new contract. This was a novation of the contract, and supported by a valuable consideration moving to each of the defendants.—*Hixon v. Hetherington*, 57 Ala. 165; *Fluker v. Henry*, 27 Ala. 403; *Rutledge v. Townsend*, 38 Ala. 706; *Allen v. Prater*, 30 Ala. 458; *Maull v. Vaughn*, 45 Ala. 134.

COLEMAN, J.—The authorities are uniform in holding, that any agreement supported by a valuable consideration, made by the creditor and principal debtor, without the assent of the surety, by which the debt of the principal is extended, operates a discharge of the surety.—*Mobile & Montgomery R. R. Co. v. Brewer*, 76 Ala. 142.

An agreement for the extension of a debt, founded upon a partial payment made after maturity, is not supported by a sufficient consideration to discharge a surety; but, if the partial payment be made before the maturity of the debt, it is sufficient to support an agreement for the extension of the debt, and if made without the assent of the surety he will be discharged.—Brandt Sur., § 306, and note. Payment of interest on a note in advance has been held to be a sufficient consideration to support an agreement for the extension of a debt.—*Vestal v. Knight*, 15 S. W. Rep. 16. In the case of *Turner v. Williams*, 12 S. W. Rep. 989, the law is stated as follows: "The acceptance of interest in advance of the maturity of a note is *prima facie* evidence of a binding

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contract to forbear and delay the time of payment, and no suit can be maintained during the period for which the interest has been paid, unless the right to sue be reserved by the agreement of the parties." The payment of the interest in advance is not, of itself, the contract for delay, but is evidence of such contract, and in the absence of rebutting evidence is conclusive. See *Brandt, Sur.*, § 305; also, *Uniontown v. Mockey*, 140 U. S. 220.

We are satisfied that, if plaintiff demanded the payment of interest for six months before it had accrued, and it was paid in advance by the principal debtor, upon the agreement that the debt should be extended six months, or any other definite time, and was accepted upon such agreement, it would be a sufficient consideration to support the agreement for the extension of the time; and if this was done without the knowledge and assent of the surety, it would operate a discharge of the surety.—*Scott v. Mobile & Girard R. R. Co.*, 322.

The evidence of Scott, the principal debtor, was competent to prove, and tended to prove, that the plaintiff knew that Freeman was only a surety.—*Summerhill v. Tappan*, 52 Ala. 227; *Walton v. Williams*, 44 Ala. 349; *Br. Bank of Mobile v. Coleman*, 20 Ala. 140; 9 Ala. 949. He says, that plaintiff inquired of him "what security he could give" to procure the loan of the money. "I told him I could give my note with Freeman as surety." The evidence of both the defendants tended to show that the notes sued upon were mere renewal notes, extending the time of payment. It was for the jury to determine the weight and credibility of their testimony.

The notes sued upon were dated January 4th, 1890, and due six months after date. There is evidence tending to show that in July, 1890, the plaintiff agreed to extend the time of the maturity of the notes to January 4th, 1891, upon the payment of the interest in advance for that period, and upon this agreement the interest was paid in advance. There is evidence tending to show this agreement was made without the assent of the surety.

The court erred in giving the general charge in favor of the plaintiff, and erred in refusing to give charge No. one requested by the surety. Some of the charges requested by the defendant, notably charge No. 2, failed to hypothesize the fact of knowledge of the suretyship on the part of the plaintiff, and were properly refused. We do not apprehend that there will be any further difficulty on another trial.

Reversed and remanded.

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112	579
113	475
115	425
96	389
133	430

Howle v. North Birmingham Land Company.

Bill in Equity to enforce Vendor's Lien on Land; Cross-Bill for Rescission of Contract.

1. *Rescission of contract, at instance of purchaser, on ground of fraud.* A court of equity will not decree the rescission or cancellation of a contract for the sale of land, at the instance of the purchaser, on account of fraudulent misrepresentations made by the vendor, upon a bare probability, or mere preponderance of the evidence, but requires the complainant to establish his case by clear and convincing evidence.

2. *Same; laches.*—The purchaser of land, claiming a rescission of the contract on the ground of fraud, must act with promptness on its discovery; and when he delays for three years, as in this case, and then sets up the fraud in defense of a bill to enforce a vendor's lien, relief will be refused on account of the *laches*.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. THOMAS COBBS.

The original bill in this case was filed on the 27th March, 1890, by the North Birmingham Land Company, a private corporation, against W. P. Howle; and sought to enforce a vendor's lien for unpaid purchase-money, on two lots which the complainant had sold to the defendant. The defendant, by answer and cross-bill, asked a rescission of the contract, on account of alleged fraudulent representations made by the complainant's agent who negotiated the sale, and which were alleged to be a material inducement to the purchase. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, but did not notice the cross-bill; and his decree is here assigned as error.

S. J. DARBY, and WATTS & SON, for appellants, cited *Juzan v. Toulmin*, 9 Ala. 662; *Atwood v. Wright*, 29 Ala. 346; *Foster v. Gressett*, 29 Ala. 393; *Pomeroy's Equity*, §§ 878, 880-90; 1 Brick. Digest, 688, §§ 705-07.

GARRETT & UNDERWOOD, *contra*, cited *Bradfield v. Elyton Land Co.*, 93 Ala. 527; *B. Elevator & Warehouse Co. v. Elyton Land Co.*, 93 Ala. 549.

WALKER, J.—On the 14th day of January, 1887, the appellant contracted for the purchase of the lots upon which

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the vendor's lien is claimed, paid one fourth of the purchase-money in cash, for the balance thereof executed his three notes, each for one fourth of the purchase-price, and payable respectively one, two and three years after date, and received from the appellee its bond for title. The note for the first deferred installment of the purchase-money was paid at its maturity. No payment having been made on the other two notes, the original bill in this case was filed in March, 1890, for the enforcement of the vendor's lien on the lots sold. The appellant filed an answer and cross-bill, alleging that certain false and fraudulent representations were made by the appellee's agent, and that appellant was induced to make the purchase by his reliance on the truth of such representations. The cross-bill prays that the contract of sale be set aside and vacated, that the notes described in the original bill be delivered up and cancelled, and for a decree in favor of the cross-complainant for the amount already paid by him on the purchase, with a lien on the lots.

It may be conceded that the cross-bill sufficiently charges such false representations by the agent of the seller as would authorize the purchaser to demand a rescission of the contract of sale. Still, the purchaser is not entitled to a rescission on the facts developed in this case. In the first place, it may be remarked, without going into a discussion of this feature of the case, that the evidence of the alleged representations, and that they were falsely and fraudulently made, is not altogether satisfactory. The right to the rescission or cancellation of a contract, because of fraudulent misrepresentations, must be established by clear and convincing proof. A court of equity can not grant such relief upon a probability, nor even upon a mere preponderance of the evidence. The representations themselves, and that they were falsely and fraudulently made, must be clearly established.—*Bailey v. Litten*, 52 Ala. 282. We are not satisfied that the evidence as to the representations alleged in the cross-bill come up to the high standard required in such cases.

We do not, however, rest the decision of the case upon the insufficiency of the evidence in this regard. The right to rescind a contract, because of fraudulent misrepresentations, is one which can not be availed of unless it is promptly asserted. Mr. Pomeroy says: "All these considerations as to the nature of misrepresentations require great punctuality and promptness of action by the deceived party upon his discovery of the fraud. The person who has been mis-

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led is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission, or refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it was still subsisting and binding, he thereby waives all benefit of, and relief from the misrepresentations."—2 Pomeroy's Eq. Juris. § 897. The deceived party can not remain quiet, and hold in reserve his option to rescind, to be asserted if a turn in events shall make it to his advantage to get rid of his obligations, but to be abandoned if it shall suit his purposes to hold the other party to the contract. Fraudulent misrepresentations in the sale of real estate do not confer upon the defrauded party the speculative advantage of being entitled to wait for the rise or fall in the value of the property, and then act according to his interest in the matter. If the deceived party, after discovering the falsity of the representations upon the truth of which he claims to have relied, does not promptly avail himself of the right to rescind, he loses that right, and his failure for a considerable length of time to impeach the transaction raises a presumption of his acquiescence in its validity.—*Lockwood v. Fitts*, 90 Ala. 150; *Orendorff v. Tallman*, 90 Ala. 441; *Sheffield Land L. & C. Co. v. Neill*, 87 Ala. 158; *Garrett v. Lynch*, 45 Ala. 204.

The misrepresentations alleged and relied on in this case were in reference to improvements to be made on the property of the appellee in the neighborhood of the lots sold to the appellant. The appellant himself says: "The proposed improvements and the representations of the president of the company, as to what improvements they were prepared to make, and would make that year (1887), induced me to purchase the lots. Without these representations I would not have purchased the property." Yet, after the time had elapsed within which he says the improvements were to have been made, he recognized the contract of sale as binding upon him, and, without objection, so far as the evidence disclosed, he paid the installment of the purchase-money which was due in 1888. It was obvious then that the alleged representations as to facts existing at the date of the sale were not true, and that the engagements for the future had not been performed. Still, in view of these de-

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velopments, the purchaser did nothing which could stand in the way of his holding the seller to the contract, if the property should enhance instead of depreciate in value. He recognized the purchase as binding by making a payment on it. Not until after he had waited more than two years longer, and until after a bill had been filed for the unpaid balance, did he do anything to indicate his disavowal of the validity of the contract. No attempt is made to excuse or explain the long delay. It is not suggested that the alleged fraud was not as well known to the purchaser in 1888 as it was in 1890. The proof does not show that he was reasonably prompt to exercise his election to disaffirm the contract. His conduct strongly indicates that he acquiesced in the transaction as subsisting and binding—that he ratified it, rather than that he repudiated it. The long delay, wholly unexplained, raises the presumption that he elected to treat the contract as binding, and to waive any objections he may have been entitled to urge because of misrepresentations. The purchaser's present contention is not consistent with his conduct for the period of more than three years, during which the validity of the contract was not questioned, though it was plain that the expectations which it is now claimed were relied on were not realized. We are satisfied that the appellant is not entitled to a rescission, and that he did not make out a defense to the original bill.

Affirmed.

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117 420

Manning v. Louisville & Nashville Railroad Co.

Action for Damages by Ejected Passenger.

1. *Travelling on forfeited ticket.*—A regulation adopted by a railroad company requiring a passenger who is found travelling without a ticket, or on a ticket which has been forfeited, to pay for the part of the route already passed over, as well as the part yet to be travelled, is a reasonable rule; and on his failure or refusal to comply with it, the passenger may be ejected.

APPEAL from the Circuit Court of Jefferson.
Tried before the Hon. JAS. B. HEAD.

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BOWMAN & HARSH, for appellant, cited *Ward v. N. Y. & H. Railroad Co.*, 56 Hun, N. Y. 268.

HEWITT, WALKER & PORTER, *contra*, cited *Pennington v. Railroad Co.*, 18 Amer. & Eng. R. R. Cases, 310; *Stone v. C. & N. W. Railroad Co.*, 47 Iowa, 82; *Davis v. Railroad Co.*, 53 Mo. 317; *State v. Campbell*, 32 N. J. L. 309; *Pickens v. Railroad Co.*, 40 Amer. & Eng. R. R. Cases, 649; *Swan v. Railroad Co.*, 6 Ib. 327; 3 Wood's Railway Law, § 361; *Wheeler on Carriers*, 174, note; *A. G. S. Railroad Co. v. Carmichael*, 90 Ala. 19; *Boylan v. Hot Springs Railroad Co.*, 40 A. & E. R. R. Cases, 666.

STONE, C. J.—Plaintiff purchased an excursion ticket to and from New Orleans, from defendant's ticket-agent at Birmingham. He obtained it at reduced rates, but on certain conditions as to its use, which were printed on the ticket and subscribed by him. Plaintiff testified that he had read the conditions. Among them are the following: "In consideration of the reduced rate at which this ticket is sold, I, the undersigned, agree with the Louisville & Nashville Railroad Company as follows: That on the date of my departure, returning, I will identify myself as the original purchaser of this ticket by writing my name on the back of this contract, and by other means, if required, in the presence of the ticket-agent of the Louisville & Nashville Railroad Company at the point to which this ticket was sold, who will witness the signature, date, and stamp the contract; and that this ticket and coupons shall be good returning, only for a continuous passage from such date, and in no case later than the date cancelled in the margin of this contract."

Plaintiff conformed to all the requirements of this contract until he reached Mobile on his return trip. At that place he stopped off one day. At the end of that time he boarded another train of the railroad at midnight, and took a berth in a sleeping-car. He proceeded unmolested in his homeward trip until he passed Montgomery, and was nearing Calera, less than forty miles from Birmingham. At that stage of his journey the conductor in charge of the train discovered he was travelling on a forfeited ticket, but possibly did not learn he had so travelled before he reached Montgomery. As a condition of his proceeding farther, the conductor exacted of him that he should pay fare from Montgomery to Birmingham, or, failing, that he would be put off the train at the next station, which would be Calera.

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Reaching Calera, plaintiff procured from the ticket-agent at that place a ticket to Birmingham, and upon that ticket sought to continue his journey on the same train. This the conductor refused to allow him to do, stating that, under the road's regulations, he could not permit him to proceed unless he would also pay the back fare from Montgomery. This he failed to do, and was ejected from the train. The present action is brought to recover damages for such ejection. The court gave the general affirmative charge for the defendant.

A regulation by which railroads, when passengers are found on their trains who have no tickets, or who have only forfeited tickets, require of such passengers fare, not only for that part of the route to be travelled, but also for the part already passed over, is certainly a reasonable one. If persons who are attempting to ride without paying fare can have the past forgiven, and need pay only from the place and time of their detection, would not this be the offer of a premium for an attempted undue advantage of the railroad? The regulation needs no argument to uphold its reasonableness.

The authorities are uniform, and very abundant, that the conductor was authorized to demand fare, not only for the portion of the road yet to be travelled, but equally for that part of the road plaintiff had been carried, after his ticket had become *functus* by virtue of his stop-over. And the conductor was fully justified in ejecting Manning from the train, on his refusal to pay the fare as demanded.—3 Wood's Railway Law, § 361. p. 1433; Wheeler Law of Carriers, 174; Hutcheson on Carriers, 2d ed., § 580 a; *Hill v. S. B. & N. Y. R. R. Co.*, 63 N. Y. App. 101; *State v. Campbell*, 32 N. J. Law, 309; *Swan v. M. & L. Railroad*, 132 Mass. 116; *Davis v. Kansas City, St. Lo. & C. B. R. R. Co.*, 53 Mo. 317; *Stone v. C. & N. W. R. Co.*, 47 Iowa, 82; *Hall v. Memphis & Ch. R. Co.*, 9 Amer. & Eng. R. R. Cases, 348; *Pennington v. Phila. & Balt. R. R. Co.*, 18 *Ib.* 310; *Pickens v. Rich. & Danv. R. Co.*, 40 *Ib.* 649; *Atch., Top. & Sante Fe R. Co.*, 34 *Ib.* 290; *Johnson v. Concord R. R. Corp.*, 46 N. H. 213; *Rose v. W. & W. R. Co.*, 11 S. E. Rep. 526.

Plaintiff, appellant here, relies on *Ward v. N. Y. Cen. & Hudson Riv. R. R. Co.*, 63 N. Y. Sup. Ct. Rep., 268, as an authority in his favor. The ticket in that case was an ordinary one, and had no clause or stipulation requiring or looking to continuous passage. The decision is rested on the absence of that provision. It refers to and approves many of the decisions we have referred to above, pronounced

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on contracts requiring continuous passage. Properly interpreted, that case is an authority against appellant.

In *Ala. Gr. So. R. R. Co. v. Carmichael*, 90 Ala. 19, we took occasion to comment on the great importance, the public necessity, of wisely observing regulations in the running of trains on railroads. We need not repeat what we there said.

We hold that in the charge given to the jury the Circuit Court strictly followed the law.

Affirmed.

Harold v. Herrington.

Mandamus to County Treasurer.

1. *Fine and forfeiture fund; constitutionality of law changing disposition of, as against registered claims.*—The fund arising from fines and forfeitures in the several counties is the creature of statute, and is subject at all times to legislative control, as to the claims to be paid out of it, their preferences, and other conditions of payment; and the holder of claims, which have been duly registered under existing statutes, does not thereby acquire such a vested right to share in the fund as to exempt the claims from a subsequent statute changing the priority and mode of payment.

2. *Same; act of Feb. 9th, 1891, regulating fund in Conecuh and Escambia counties.*—The statute approved February 9th, 1891, "to regulate the fine and forfeiture fund of Conecuh and Escambia counties, and the disposal of moneys arising from fines, forfeitures and convict labor in said counties" (Sess. Acts 1890-91, pp. 494-5), which requires that the money belonging to the fund shall be held subject to the order of the County Commissioners, that they shall advertise for bids from the holders of claims, and award the money to the highest bidder, is not violative of any rights acquired by the holders of claims which, by being duly registered under former statutes, had acquired a priority or preference over claims subsequently registered, nor otherwise unconstitutional.

APPEAL from the Circuit Court of Escambia.

Tried before the Hon. JOHN P. HUBBARD.

The appellant in this case, Andrew Harold, presented his petition to the presiding judge of the circuit, asking for a *mandamus* directed to James Herrington, as county treasurer of Escambia, requiring him to pay, out of moneys in his hands belonging to the fine and forfeiture fund of the county, certain claims held by the petitioner, which had been duly registered prior to the 9th February, 1891, and which, he claimed, were entitled to payment because all claims previ-

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97	175

96	395
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128	572

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ously registered had been paid, and there was money in the treasurer's hands sufficient to pay them. The defendant admitted the facts stated in the petition, and justified his refusal to pay the claims on the statute regulating the disposition of the fund in Escambia and Conecuh counties, which made a different disposition of it.—Sess. Acts 1890–91, p. 494. On the hearing, the facts being admitted, the court sustained the constitutionality of said statute, and dismissed the petition. The petitioner excepted to this ruling, and he here assigns it as error.

DAVISON & MCGOWAN, for appellant, cited *Fisk v. Police Jury*, 116 U. S. 131; 3 Brick. Digest, 128, § 37.

McCLELLAN, J.—The fine and forfeiture fund of the several counties arises, under statutory provisions, from the administration of criminal laws, is of itself, indeed, the creature of statute, and is subject to the control of the legislature, in such sort that “the claims to be paid out of it, their preferences, and the conditions of payment, may be modified or changed by the General Assembly.”—*Sessions & Leary v. Boykin*, 78 Ala. 328; *Herr v. Seymour*, 76 Ala. 270. In the exercise of its unquestionable authority in this behalf, the legislature has seen proper to devote this fund, in most of the counties, exclusively to the payment of witnesses' and officers' fees for services rendered in criminal cases, where the cost can not be made out of the defendant; but it was in nowise incumbent on the law-makers to devote the fund to these purposes, and neither officers or witnesses would have any legal ground of complaint, if the whole of it should be devoted to other ends, as a part of it is in some instances. See *Stone v. Ames*, 91 Ala. 644. Nobody has, or can have, a vested right to share in or be paid out of the fund, since the right so to do, when it is accorded by the legislature, is a matter of mere grace and expediency. And all services performed by officers or witnesses, at a time when compensation therefor may be paid out of the fund in the event it is not collected from defendants, in causes in which the services are rendered, must be held to have been performed in recognition of the General Assembly's plenary power to so change existing statutory provisions as to withdraw the fund from application to such claims altogether, or to provide a different mode for such application, and make the right to share therein depend upon other conditions which might involve a *pro rata* distribution in lieu of payment in full in the order in which claims are registered.

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These considerations, and the authorities cited, lead us to the conclusion, that the Circuit Court properly sustained the constitutionality of the act of Feb. 9, 1891, which provided a different method from that which had theretofore obtained for the disposition of the fine and forfeiture fund of Escambia county, and, of consequence, denied appellant's petition for *mandamus* to compel the county treasurer to pay certain claims held by petitioner, as required by statutes which in this respect were repealed by the act referred to; and its judgment is affirmed.

Bromley v. Birmingham Mineral Railroad Co.

Action for Damages against Railroad Company, by Administrator of Deceased Brakeman.

1. *Error without injury in rulings on pleadings.*—The sustaining of a demurrer to the original complaint, if erroneous, is error without injury, when the record shows that the plaintiff had the full benefit of the same issues under the amended complaint.

2. *Proof of negligence and consequent injury.*—In an action to recover damages for personal injuries, it is not enough for the plaintiff to show negligence on the part of the defendant and injury to himself, but he must adduce some evidence tending to show that the injury resulted from the negligence, and the instinct of self-preservation on his part can not supply the place of this; yet, where there is any evidence from which the jury might legally infer a causal connection between the negligence and the injury, the question should be submitted to them.

3. *Same; injuries to brakeman on top of car.*—Plaintiff's intestate, a brakeman on a freight train which had separated into two parts, and whose duty it was at once to apply the brakes, was last seen alive while standing near the brake on top of a rear car, and a few moments afterwards, the car having run over him, his body was found lying between the rails. No one saw him fall, and there was no evidence as to the circumstances immediately attending his death; but it was shown that there was a foot-board across the top of the car for him to walk on, and a hole three or four feet wide in the car which extended to or under the foot-board, and the existence of which was known to the conductor. *Held*, that the question should have been submitted to the jury whether the hole in the roof caused the injury.

4. *General charge in evidence.*—The proper test as to whether the court should give the affirmative charge seems to be, whether the court would be justified in sustaining a demurrer to the evidence.

5. *Proof of relationship and dependency, as affecting measure of damages.*—In a statutory action against the employer, by the personal representative of a deceased employe (Code, § 2590), it is not error to exclude proof of the fact that the deceased left a wife and minor

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98	158
95	397
99	162
98	397
102	630
95	397
106	607
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110	175
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114	145
114	534
95	397
120	263
95	397
131	422
95	397
144	264

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child dependent on him, unless followed by an offer to prove his expenditures on their account. When such additional evidence is adduced, the measure of recovery is declared in *L. & N. Railroad Co. v. Trammell*, 93 Ala. 350, and *McAdory v. L. & N. Railroad Co.*, 94 Ala. 272.

APPEAL from the Circuit Court of Jefferson.
Tried before the Hon. JAS. B. HEAD.

BOWMAN & HARSH, for appellant.

HEWITT, WALKER & PORTER, *contra*.

COLEMAN, J.—This action was brought to recover damages for personal injuries to plaintiff's intestate, James C. Grant, who was an employe of defendant as a brakeman, and which resulted in his death. The original complaint contained two counts. The court sustained a demurrer to each of these counts. The plaintiff amended his complaint by adding a third count, upon which issue was joined. The court gave the general affirmative charge to the jury, to find for the defendant. It is insisted that the court erred in sustaining the demurrer to the first and second counts. The plaintiff had the benefit of every issue under the third count, which could have been raised under the first and second counts, to which the demurrer was sustained. If the court erred in sustaining the demurrer, it was error without injury.—*Gilman v. Jones*, 87 Ala. 704; *Sharp v. First National Bank*, 87 Ala. 644.

The facts show that deceased was a brakeman in the employ of the defendant railroad company; that as the train was running between Bessemer and Redding, it separated into two sections; that the much larger section attached to the engine moved more rapidly forward; and that deceased was on the hindmost section, which was composed of only a caboose and box-car. The evidence also shows that, when a train separates into two parts, it becomes the duty of the brakeman to apply the brakes, and stop the cars with all practicable dispatch. There was no evidence offered by plaintiff to sustain the charge of negligence in the management and control of the engine and cars by the conductor and engineer, or that the side-ladder mentioned in the complaint was loose or defective, or that there was any defect in the brake-rod or brake-wheel. The evidence showed that the box-car was broken on top at the right-hand corner facing the engine. The evidence shows that this hole was known to the conductor before the injury, and had not been

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remedied. The evidence does not show how long deceased had been in the employ of the defendant, or whether he was an experienced brakeman, or that his attention had been called to the defect in the top of the box-car. It is presumable that he could not approach that end of the car in the day-time without seeing the hole. The evidence shows that the box-car was about eight feet in width; that there was a foot-board for the use of brakemen, about two feet wide, on top of the car, running along its centre from one end of the box-car to the other. If the hole in the top of the box-car was three or four feet square, the break would extend near or to the middle of the car; but there was no evidence to show that the foot-board was crushed, or that the hole in the top of the car rendered the foot-board less secure as a standing-place. There was no evidence on these questions. The evidence shows that the brakes were at the end of the cars; but whether to one side of the centre, and which side, or in the centre of the car, is not shown. It is shown that a brakeman must stand on top of the box-cars to set up brakes; but whether this duty is performed by standing on the foot-board, or to one side, is not proven. No one saw deceased when he fell, or knew where he was precisely at the time of his fall, or what he was doing, or what caused his fall.

If the facts and circumstances proven are such that a jury would be authorized to legally infer that deceased was engaged in the performance of his duties as brakeman; that the hole in the top of the box-car was the proximate cause of the injury and if there was no evidence of contributory negligence, then the court was not authorized to give the general charge for the defendant; but, under such proof, the question should have been submitted to the jury. If, however, the facts proven leave the question as to what caused the injury wholly in conjecture, as distinguished from legal inference, there was nothing to submit to a jury. The burden is upon the plaintiff to make out his case. He must not only aver and prove both an injury and negligence, but he must go further and establish a proximate causal connection between the injury and the negligence.

The witness Brandon testified as follows: "I last saw Grant standing on the box-car, just a few minutes before I saw him on the track dead. The cars were parted when I last saw him standing on this car. I did not see him fall. He did not fall at the time the cars parted, but after they had parted and gotten a considerable distance apart." And being recalled, testified further, "The corner of the car was

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turned up. After the cars broke in two, Grant was standing at this brake." The witness Dangair testified, that he was in the caboose with the conductor when "the conductor detected that something unusual had gone over on the track, and looked out the back door and saw a man." When they went back, "they discovered it was Grant, and that he had been run over," &c. The testimony shows that he was lying on the track "between the rails." As we have said, no one saw decedent when he fell, or testified as to what part of the car he was upon, or what he was doing, precisely at the time of his fall.

In *Burns v. Chicago, Milwaukee & St. Paul Railway Co.*, 69 Iowa, 450, the following facts and propositions of law as applicable thereto are stated: Plaintiff's son, an experienced brakeman, when last seen alive, was performing his duty in setting the brakes on a freight car on which he was riding. A minute later, the train having separated at the first coupling in front of him, he was thrown to the ground, run over by the rear end of the train, and killed. Although there was no other evidence bearing on the question of negligence, or of freedom from it on his part, "*held* that the court was justified in submitting it to the jury, in an action against the company for negligence." The court uses this further language: "We are not prepared to say there was no evidence which authorized the court to submit the question of due care on the part of the deceased to the jury, who had the right to consider all the circumstances, including the known habits of the deceased, and the instinct of self-preservation with which all men are imbued. *If the cause or manner of the death were wholly unknown, it may be that a different rule should prevail.*" We italicise the last sentence.

In the case of *Allen v. Willard*, 57 Penn. St. Rep. 38, the facts were, that Allen was found dead in a pit or cellar which had been extended out into the side-walk, about two and a half feet, and left unguarded. It was shown that Allen was a sober, careful man, whose business called him to pass the night he fell into the pit, along the side-walk. The court held: "The natural instinct which leads men in their sober senses to avoid injury and to preserve life, is an element of evidence. In all questions touching the conduct of men, motive, feeling and natural instincts are allowed to have their weight, and to constitute evidence for the consideration of courts and juries. Adding these to the circumstances of the case, we can not say that the evidence was insufficient to go to the jury as proof of actual neglect on the part of the

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defendants. We discover nothing from which an inference could be justly drawn of concurring negligence on the part of the deceased. It was sufficient to justify a finding that Willard came to his death by an accidental fall into the cellar, and that this was owing to the unguarded condition of the cellar on that night." In this case, the rule was recognized, that it must be shown by affirmative evidence that the injury was caused solely by the negligence of the defendant; but the court held to the doctrine that "the proof need not be direct and positive, by some one who witnessed the occurrence, and saw how it happened, but it must be such as shall satisfy reasonable and well-balanced minds that it was the result of the negligence of the defendants."

In the case of *Strong v. City of Stephens Point*, 62 Wis. 255, the facts were, that Edward Strong, a boy, was seen crossing a bridge over a slough, and going in the direction of a hole in the bridge. The attention of the witness was diverted for a few seconds, and when he looked back the boy had disappeared. His hat and body were found in the water underneath, and a few feet west of the hole, in the direction of the current. It was contended that there was no evidence that the boy fell through the hole. The court held, that though the testimony was circumstantial, the fact that the boy was seen on the bridge near the hole, just before he disappeared, the place where the body and hat were found, in relation to the hole, indicated that he had fallen through it, and was sufficient to warrant the jury in finding that such was the manner of his death.

In the case of *Gay v. Winter*, 34 Cal. 164, after referring to the case of *Lane v. Crombie*, 12 Pick. 176, which held that the burden of the proof was on plaintiff, not only to show negligence and misconduct on the part of the defendant, but ordinary care and diligence on his part, and failing in this, there is no case for the jury, the California court declares the rule as follows: "While we admit the general rule to be, that the burden of proof is on the plaintiff to make a case which will leave him blameless, we do not understand that he must prove affirmatively, in all cases, that he exercised ordinary care and diligence. In the absence of any direct proof, we are of the opinion that the jury are at liberty to infer ordinary care and diligence on the part of plaintiff from all the circumstances of the case, his character and habits, and the natural instincts of self-preservation. If the plaintiff makes a case which does not charge him with negligence, we think his case should be allowed to go to the jury, with instructions that, if

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the plaintiff's intestate did not exercise ordinary care and diligence, he could not recover."

In the case of *Corcoran v. Boston & Albany R. Co.*, 133 Mass. 507, the facts were, that plaintiff's intestate was a brakeman in the employ of the defendant. On the night he was killed, the train was passing through a cut, the sides of which were of rock, and the rail was five or six feet from the face of the rock. Ice had formed on the side of the rock, and projected about two feet; the freight car projected twenty-four inches beyond the rail, and a man on a ladder on the side of the car would project from one to two feet. It was the duty of the brakeman to ascend a ladder on the side of a house car to set the brakes on that car. His lighted lantern was seen on the top of this car, and was afterwards found there. An impression was found in the snow, indicating that something heavy had fallen there, by the side of the track, just east of the place where the ice on the side of the cut came nearest to the track. Blood spots were found some distance east of this point, and it was further away that the body was found. It was the duty of the section men employed by the defendant to see that the cut was kept in proper and safe condition and free from ice. The trial judge ordered a verdict for the defendant. On appeal, the court held that "the burden of proof is upon the plaintiff to show that her intestate was using due care when the accident happened." . . . "It is impossible" (says the court) "to tell from the evidence how the intestate fell from the cars, what he was doing at the time, whether his death was instantaneous, or whether he endured any conscious suffering before his death. These questions are left to conjecture." It was held that the trial court rightly directed a verdict for the defendant.

In the case of *Riley v. Connecticut River Railroad Co.*, the facts were, that the deceased brakeman was last seen alive within about a quarter of mile southerly of the bridge, standing on a box-car in the regular discharge of his duties; that the rear of the box-car was next to a platform car; that he was next seen dead on the track about one hundred rods on the north side of the bridge. There was no blood on the track within about sixty rods north of the bridge, but from there to the body there was blood on the track. There was blood on the trucks of the platform car. The watch of deceased was found on the platform car. The evidence showed that a person standing on the box-car would come in contact with the bridge at the time of passing. There was no warning signals, guards or "tell-tales," main-

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tained to warn brakemen of approaching danger. Upon this evidence it was contended that the jury might infer due care and diligence on the part of the intestate. The judge directed a verdict for the defendant. This ruling was affirmed on appeal, the court holding that the evidence wholly failed to show that the intestate was using due care, or that his death was not instantaneous.

The general rule is stated by Earle, J. in the case of *Cordell v. N. Y. Central & Hudson River R. R. Co.*, 75 N. Y. 332, as follows: "To maintain the action, the plaintiff must show that the death of the intestate was caused solely by the negligence of the defendant, and this must be shown by competent proof. It must not be left to mere speculation. When a person has been killed at a railroad crossing, and there are no witnesses of the accident, the circumstances must be such as to show that the deceased exercised proper care for his own safety. When the circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be non-suited. The presumption that every person will take care of himself from regard to his own life and safety can not take the place of proof, because human experience shows that persons exposed to danger will frequently forego the ordinary precautions of safety."

Other cases might be cited from different States, some of which follow the rule as declared in the cases cited from Massachusetts and New York, and others that declared in the cases cited from Pennsylvania, Wisconsin and California. Many are collected and cited in the notes to the 4th volume of *Amer. & Eng. Encyc.*, p. 76.

In this State the rule is firmly established, that contributory negligence is matter of defense; that it is incumbent on the defendant to plead it, and the burden rests on the defense to sustain the plea by proof, unless the evidence offered by the plaintiff in support of his case establishes contributory negligence on his part, in which event it can not be held that he has made out his own case. Contributory negligence being matter purely defensive under our decisions, it must follow that there are no presumptions against a plaintiff of a want of due care and diligence on his part, and that there is no burden on him to prove affirmatively that he exercised due care and diligence. The burden of proving contributory negligence resting on the defendant, it follows that where the proof shows injury, caused by the culpable negligence of the defendant, and the proof is wholly silent as to contributory negligence,

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the plaintiff is entitled to recover. In this respect the rule is different in this State from that which prevails in Massachusetts and some other States. Those citations from Massachusetts further show that habits of prudence and skill, and the instinct of self-preservation, are not regarded as elements of evidence.

The general rule prevailing in this State in regard to giving the general affirmative charge is, that when the evidence is conflicting, or where different inferences can be reasonably drawn from the evidence, or where there is any evidence tending to establish the case of the other party, the general affirmative charge should never be given.—*Payne v. Mathis*, 92 Ala. 585; *Bowden v. State*, 91 Ala. 61; *Railroad Co. v. Propst*, 90 Ala. 1; *Railroad Co. v. Smith*, 90 Ala. 25. Applying these principles to the facts of the present case, were there any facts in evidence which tended to show that the hole in the top of the car was the cause of the death of plaintiff's intestate? The cars having separated, it became the duty of the brakeman immediately to set up brakes. He was last seen alive at the end of the car where the brakes were. The car was eight feet wide. On the top of the car, at the right-hand corner at the end where the brakes were, there was a hole three or four feet long, according to one witness, and three or four feet square according to another witness. If the extreme of the latter testimony be true, the hole extended to the middle of the car, and under the centre foot-board, upon which the brakeman was required to walk. The evidence tends to show that deceased, when first seen after his fall, was lying between the rails of the track, just after he was run over by these cars. The question presented is not, what the weight of the evidence establishes, or whether, if the court under the statute had tried the facts and found the issue for the defendant, the proof was sufficient to sustain the judgment of the court, but, as the facts were to be submitted to a jury, the real question is, under the principles of law we have declared, were there any facts and circumstances which tended to show that the defect in the top of the car caused him to fall, or would such an inference lie wholly in conjecture. The proper test as to whether the court should give the affirmative charge at last seems to be, would the court be justified in sustaining a demurrer to the evidence.

In the case of *Allen v. Willard*, 57 Penn. St. Rep., *supra*, it was evident that Allen came to his death by falling in the unexpected pit, and the question was one of care on his part. So, in the case of *Strong*, 62 Wis., *supra*, the proof

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was sufficient to show that the boy came to his death by falling through the hole in the bridge, and the only question was as to contributory negligence by the deceased. In the Massachusetts case, 133 Mass. *supra*, although the proof showed an impression in the snow as if a heavy body had fallen there, just where the ice projected, the court held that the proof was not sufficient to submit the question of care to a jury. The Iowa case, 62 Iowa, 450, *supra*, is more analogous; but even in this case, the court assumes that the deceased was thrown to the ground in consequence of the negligent uncoupling of the cars; and adds, as we have stated above, "If the cause or manner of the death were wholly unknown, it may be that a different rule should prevail." There was no evidence introduced as to the habits of prudence and skill of the deceased, and how far these, if at all, constitute proper elements of evidence, need not be considered. See the case of *Mem. & Chas. R. Co. v. Glass*, 94 Ala. 581, on this point. In our opinion, the natural instincts of self-preservation may be regarded as evidence, or proof, only so far as that when the injury is shown to have resulted from the negligence, and there is no evidence of concurring negligence, we will not presume against the natural instinct of self-preservation, which, to some extent, is possessed by all sane people, that the injured person contributed to his own injury; but this principle can not be extended so that the doctrine of self-preservation may be regarded as a fact from which it may be legally inferred that the injury did result from the negligence of the defendant, when there is no evidence of this fact, other than that an injury was suffered and the negligence existed. There must be some proof or circumstance to show that the negligence caused the injury, and the presumption that no one will contribute to his own injury can not take the place of such evidence. It is not necessary that there be an eye-witness, if there are other circumstances, which tend to show that the defect in the top of the car caused the fall; and if these were shown, the general charge should not have been given. Considering the character of the hole, its location with regard to the location of the brakes, the duty to be performed in setting up brakes, the fact that the brakeman was last seen alive at this point where his duty called him, that he fell and was run over by the cars; taking into consideration these attending circumstances, we can not say that there was no evidence from which an inference might not be legally drawn by a jury that the defect caused the injury. We think, under all the facts proven, that the question should have been referred to the jury.

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Plaintiff offered to prove that his intestate left surviving him a wife and minor child dependent on him for a support, but upon objection this proof was excluded. There is hardly enough in the record to enable the court to say this was error. If plaintiff had offered to follow up such proof, with evidence that deceased expended in whole, or in part, his earnings upon his wife and child, the evidence should have been admitted. The mere fact of relationship, although it is one which apparently indicates dependency, without proof of expenditure in that direction affecting the net income, can not strengthen the right to recovery, or affect the measure of damages. Where the relation of dependency exists, and the proof shows expenditure for their benefit, the measure of recovery as affected by this proof is declared in the case of *L. & N. R. R. Co. v. Trammell*, 93 Ala. 350. If the income, exceed the outlay, so that there is a regular accumulation in excess of consumption the rule is declared in *McAdory v. L. & N. R. R. Co.*, 94 Ala. 272.

For the error in giving the general charge, the case must be reversed and remanded.

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Action on Common Counts, and Special Contract of Employment.

1. *Joinder of common counts with special.*—A special count, claiming damages for the breach of a contract of employment, may be joined with the common counts for work and labor and on an account stated

2. *To what witness may testify, as to performance and discharge without fault.*—Plaintiff, testifying for himself, in an action to recover damages for a breach of contract of employment, can not be allowed to state that defendant "discharged him without fault on his part," nor that he "performed his part of the contract in full up to the time of his discharge;" and the questions calling for such statements are illegal because leading.

3. *Drunkenness as cause for discharge of employe, and how proved; exclusion of evidence partly legal.*—When habitual drunkenness on the part of plaintiff, and consequent negligence and inattention to business, are set up in defense of an action for a breach of contract in discharging him before the expiration of the stipulated term of service, defendant may prove "that plaintiff was given to the excessive use of intoxicating liquors," but not "that he had been indicted in the courts of the county for the offense of public drunkenness;" but, this evidence being offered as a whole, and part of it being illegal, the whole of it may be excluded on objection.

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4. *Contract of employment by the month; charge as to construction of contract.*—A contract of employment at so much per month, with no stipulation as to the term of service, is determinable at the end of any month, at the pleasure of either party; and where plaintiff sues for the breach of a contract of employment, claiming that he was employed for a year, at stipulated monthly wages, while defendant claims that he "was only employed by the month, and for one month at a time," a charge instructing the jury that if the employment was not intended to be for a month only, then a reasonable construction would be that it was for a year, is erroneous.

APPEAL from the Circuit Court of Tuskaloosa.
Tried before the Hon. SAM. H. SPROTT.

WOOD & MAYFIELD, and FOSTER & JONES, for appellant.

FITTS & SOMERVILLE, *contra*.

STONE, C. J.—The complaint contains three counts. The first two are common counts—for work and labor done, and on an account stated. The third count alleges the making of a special contract, by which plaintiff agreed and undertook to serve defendant as clerk in his store for the year 1888, at agreed wages, that he served him a part of the year, and that he was prevented by the defendant from completing the service. This count rests the right of recovery on the alleged breach of the contract by the defendant. There was a demurrer, assigning as a ground that these counts were improperly joined in one and the same action. The Circuit Court did not err in overruling this demurrer.

Plaintiff, testifying as a witness for himself, stated that defendant "discharged him on the 31st day of July, 1888, and had not since employed him." He was then asked by his counsel "if defendant discharged him without fault on his (plaintiff's) part." This question was objected to, the objection overruled, and the witness answered in the affirmative. To this ruling defendant reserved an exception, alike to the question and to the answer. Plaintiff as a witness was also asked, "if he performed his part of the contract in full up to the time at which defendant discharged him." He answered affirmatively. Both this question and answer were separately objected to, and exceptions reserved. These questions are of kindred character.

The most important inquiry of fact in this case was, and is, whether or not the contract was for a year's service. Plaintiff testified it was, and defendant in his testimony denied it. If the contract was for the entire year, then plaintiff made out a *prima facie* case when he proved he had been

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discharged before the end of the year. In such conditions, the duty and burden would rest on the defendant to prove a justifiable cause for discharging him; and until he offered such proof, the defendant need not offer negative testimony to show he was discharged without cause. Such proof is, in its nature, in rebuttal—rebuttal of proof offered by defendant in attempted justification of the discharge of his employe. Still, plaintiff may anticipate the defendant's defense, and prove that there was, in fact, no cause for his discharge. To do so, however, he must conform to the rules of evidence. He can not state as an opinion, or as a collective conclusion of fact, that defendant discharged him *without fault on his part*.—*Tanner v. L. & N. R. R. Co.*, 60 Ala. 621; *Cummings v. State*, 58 Ala. 387; *Hames v. Brownlee*, 63 Ala. 277; *Bass Furnace v. Glasscock*, 82 Ala. 452. If he undertake to anticipate the defense, he must prove facts, and not give his opinion or conclusion on the merits of the controversy. That was one of the questions of merit the jury must pass on. The questions were leading, and the answers illegal testimony.

Defendant offered to prove that "the plaintiff was given to the excessive use of intoxicating liquors, and that he had been indicted in the courts of Tuscaloosa county for the offense of public drunkenness." On objection, this testimony was ruled out. Offered as a whole, as this testimony was, there was no error in the ruling. The second clause was not legal evidence, and it was not the duty of the court to separate the legal from the illegal, and thus do for the appellant what he should do for himself.—3 Brick. Digest, 443, §§ 570-1.

As we have said, the plaintiff testified that the contract of hiring was for the year. The defendant testified "that he employed the plaintiff to work for him by the month, and for one month at a time, and that he never employed him by the year, or for a year." The court, at plaintiff's request, gave the following written charge: "If the jury believe from the evidence that the employment was not intended by the parties to be for a month only, then a reasonable construction would be that it was for a year, in the absence of construction by the parties." The appropriateness of the word *construction*, as second above employed, not being apparent to the court, we suppose it may be a mis-copy.

It is not denied that there was a contract by which Clark employed Ryan to serve him. The only dispute in the court below was as to the terms of employment—whether by the month, or by the year. Hence, by inevitable logic,

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the testimony raised the inquiry, whether the employment was by the month, or by the year. Finding against the one conclusion, the testimony, if believed, forced the other. This, not by force of law, but by an irresistible mental process. But no witness testified that the employment was "for a month only."

But the charge is wrong, even if the testimony supported it. If, as the charge hypothesises, the jury were satisfied that the employment was not "for a month only," it would not legally or necessarily follow, as "a reasonable conclusion," that it was intended to be for a year. That would depend on the express terms of the agreement, not on legal intendment. An agreement to serve and be served at so much per month, with no stipulation as to the term of service, is determinable at the end of any month, at the pleasure of either party to the contract.—Wood on Master and Servant, 272-3. The court erred in giving this charge.

Reversed and remanded.

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Godwin v. Whitehead.

Bill in Equity to enforce Constructive Trust against Attorney.

1. *Purchase by attorney at sale under execution in favor of lunatic client; offer to do equity by client seeking to enforce trust.*—When an attorney for a lunatic, or for his guardian, sues out an execution on a decree in the lunatic's favor, and becomes the purchaser at the sale, taking the sheriff's deed to himself, he becomes a trustee for the lunatic, and it is his duty to pay the accruing taxes on the land; and if he suffers the land to be sold for taxes, again becoming the purchaser himself, he can not claim that the lunatic, seeking to enforce the trust and obtain the legal title, should repay the costs of the tax proceedings, as a part of the offer to do equity.

2. *Demurrer good only in part.*—A demurrer which is good in part only, should be overruled entirely.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. JOHN A. FOSTER.

J. C. RICHARDSON, for appellant, cited *Johnson v. Smith*, 70 Ala. 108; *Cunningham v. Jones*, 37 Kansas, 477.

J. M. WHITEHEAD, *contra*, cited *Warfield v. Campbell*, 38 Ala. 527.

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MCCLELLAN, J.—The appellee, as attorney for the guardian of appellant, who was at that time a lunatic, sued out an execution on a judgment previously rendered in the Probate Court in favor of the guardian *ad litem* of the lunatic, and had it levied on certain lands. These lands were regularly sold under said levy, and appellee became the purchaser, taking title in his own name, paid the price bid by receipting the execution, and paid the costs of the levy, sale, &c., with his own funds. He subsequently allowed the lands to be sold for taxes, again became the purchaser, paid his bid and the costs with his own money, and took a tax-certificate to himself. The present bill is filed by F. M. Godwin, who was adjudged sane and discharged from guardianship in 1887, against J. M. Whitehead, on the theory that the latter is a trustee of whatever title passed at the execution and tax-sales for the complainant, and seeks to have such title divested out of the respondent and vested in Godwin. The bill alleges that complainant has all along had possession of the lands. Of the several demurrers interposed, only one, that numbered six, was sustained; and the present appeal is taken from the interlocutory decree sustaining that assignment of demurrer. The ground of that assignment is, that "there is no offer in the bill to pay back the money paid out by respondent for taxes and costs, with interest."

It is involved in doubt whether the objection taken by this demurrer is addressed to the failure of the bill to offer to pay the costs of the execution, or the costs of the tax-sale, or both, as well as the taxes. It was on the complainant, of course, to offer to do equity. Equity required of him to refund the costs of execution, since these he would have had to pay had there been no malversation on the part of his attorney, or, what is the same thing, his guardian's attorney. Likewise, in any event he would have had to pay the taxes, and his bill should have offered to refund the money paid in that behalf by Whitehead. But, had the latter been diligent in the discharge of his duties as trustee, a capacity which the law, on the facts averred in the bill, impresses upon him, he would have paid the taxes before any costs had accrued in their enforcement, and this item of expenditure would not have been incurred but for the negligence of the trustee. Nor, having voluntarily, and in his own wrong taken upon himself the character and duties of a trustee, can he now be heard to say that he had no funds of the *cestui que trust* out of which to pay taxes; *non constat* but for his wrong Godwin, or his guardian, would have paid

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the taxes, and avoided the additional outlay consequent upon a sale of the land; and hence this item of expense may well be said to have resulted from Whitehead's misconduct as the attorney of Godwin's guardian. Certain it is, it was not necessary to incur it in the acquisition and preservation of the title in the complainant, and the fact that it was incurred by respondent must therefore be chargeable to no necessity under which complainant labored, but to the wrongful interposition and subsequent negligence of the respondent. He is not entitled to be refunded the cost of the tax proceeding and sale, and the bill was not bad for omitting an offer to refund them.—*Johnston v. Smith's Adm'r*, 70 Ala. 108; *Cunningham v. Jones*, 37 Kan. 477; *Pearce v. Gamble*, 72 Ala. 341.

Construing the assignment most strongly against the demurrant—and a like result would probably be reached even without the invocation of this rule—the conclusion must be, that the objection it presents to the bill is, in part, with reference to its failure to offer to refund taxes paid by the respondent, and in so far the demurrer is well taken; and in the other part with reference to the absence of an offer to refund the costs of the tax-sale, and in this respect the demurrer is not well laid; or, in other words, that the demurrer is not good to the full extent which it covers, but to a part only; and should therefore have been overruled *in toto*. Otherwise, the effect would be to require the complainant to incorporate an offer to pay both taxes and costs, when, as we have seen, no such offer is necessary in respect of the costs of the proceedings.—Story's Eq. Pl., § 443.

Something is said in the chancellor's opinion with reference to a necessity resting on complainant to offer to pay the respondent for his services as an attorney in suing out the execution, and in the subsequent proceedings under it. That question is not involved on this appeal, and we only mention it here for the purpose of saying that nothing in the foregoing opinion is to be taken as indicating our concurrence with the remarks of the lower court on that subject.

The decree sustaining the 6th assignment of demurrer is reversed; and a decree will be here rendered overruling that assignment.

Reversed and rendered.

Kansas City, Memphis & Birmingham Railroad Co. v. Crocker.

Action for Damages against Employer, by Injured Brakeman.

1. *Injuries to employe by negligence in management of hand-car, or lever-car.*—A lever-car, or car propelled by hand, such as is in general use on railroads by the workmen engaged in repairing and keeping up the track, is within the spirit and terms of the statute (Code, § 2590, subd. 5) which gives an action against the employer for injuries suffered by an employe by reason of the negligence of any person in the service who has charge of "any signal, points, locomotive, engine, switch, car, or train upon a railway."

2. *Evidence as to speed of moving car; what witness may state.*—Where the injuries complained of are alleged to have been caused by the negligence of the foreman of a car on which plaintiff was working, by suddenly checking it while moving at a rapid rate of speed, whereby plaintiff was thrown off, run over and injured; the rate of speed of the car being relevant and material to the issue, and plaintiff having testified that it was moving at the rate of eight or ten miles an hour, he may be asked, "About how fast, compared to a man running?" and may answer, "It was running faster than a man could run."

3. *Relevancy of evidence as to cause of stoppage of car.*—Plaintiff's injuries having been caused by the sudden stoppage of the hand-car on which he was an employe, the foreman applying the brake without notice, and there being no evidence that an extra train was heard or seen approaching, the defendant company can not be allowed to prove that, by a rule of the company, it was made the duty of the person in charge of the hand-car at once to stop and remove it from the track when a train was seen or heard approaching.

4. *Contributory negligence as defense, and how pleaded.*—In an action to recover damages for personal injuries, contributory negligence on the part of the plaintiff himself is defensive matter in the nature of confession and avoidance, must be specially pleaded (Code, § 2675), and is not available under the general issue. (Overruling *Government Street Railway Co. v. Hanlon*, 53 Ala. 70, and declaring *North Birmingham Street Railway Co. v. Calderwood*, 89 Ala. 254, explained and qualified by later cases.)

5. *Leading questions to a witness,* such as suggest to him the answer desired or expected, are properly ruled out, if objected to.

6. *Charge to jury as to weighing evidence or counting witnesses.*—A charge instructing the jury that is their duty to weigh the evidence, and not merely to count the witnesses, is not erroneous, nor liable to cause injury.

7. *Negligence in sudden application of brake to hand-car.*—If the foreman of a hand-car on a railroad track, knowing that the men who work the handles of the lever sometimes let go the handle after pushing it down, on a down grade, having nothing else to hold on to, suddenly applies the brake and stops the car, without notice to them, and without looking to see that none of them are in such dangerous

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position, "the inference of negligence is clear and certain," and the court may instruct the jury that this is negligence.

8. *Charge too favorable to party excepting.*—When the defense of contributory negligence is not presented by the pleadings, the defendant can not complain of a charge which "leaves it to the jury to say whether, under the evidence in the case, the plaintiff was guilty of contributory negligence."

9. *Charge as to conflicting evidence.*—A charge instructing the jury, where the evidence is conflicting on material facts, that if they can not say who has told the truth, then they must find the facts so far as there is conflict not proved, and if such facts are necessary to be proved in order for the plaintiff to recover, they must find for the defendant, is properly refused.

10. *Negligence in stopping hand-car suddenly; custom as to notice.*—The foreman of a hand-car on a railroad track, stopping it suddenly by an application of the brake while moving rapidly on a down grade, at a place where it was not usual to stop, and without giving notice to the men working the lever, may be guilty of negligence, if the jury so find, without proof of any custom requiring him to give notice.

11. *Presumptions as to pleas.*—When no pleas are set out in the record, but it shows that a trial was had on issue joined, and that special defenses were considered by the court below without objection, the appellate court will presume, in favor of the judgment, that proper pleas were filed to let in those defenses; but, when the only plea set out in the record is the general issue, the appellate court will not presume, in favor of a reversal, that special pleas were also filed; nor will such presumption be indulged because the bill of exceptions shows that plaintiff introduced evidence bearing on such defenses; in rebuttal of defendant's evidence in support of them, nor because he asked charges based on them.

12. *Recklessness, or willful or intentional wrong, as avoiding contributory negligence.*—Under a complaint which alleges that plaintiff's injuries were inflicted wantonly, willfully and intentionally, a recovery can not be had on proof of simple negligence merely, nor is contributory negligence a defense to the action; but a count which charges that the injury was caused "negligently, carelessly, and recklessly," is not the equivalent of a charge that it was done wantonly, willfully or intentionally.

APPEAL from the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

This action was brought by Samuel C. Crocker, a minor, suing by his next friend, against the appellant railroad company, to recover damages for personal injuries sustained by plaintiff while in defendant's service, and which were alleged to have been caused by the negligence of the foreman under whom he was working as a section-hand. The injuries were received on the 7th January, 1890, and resulted in the amputation of one of the plaintiff's legs. The action was commenced on the 24th May, 1890. The complaint contained two counts, each of which alleged that, at the time of the accident, plaintiff was in the defendant's service as a laborer, or section-hand, working under one Charles West, to whom as foreman was intrusted the superintendence of a "car

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propelled by hand, called a lever-car," and also of the several section-hands under him. The first count alleged that, on the day specified, "whilst said car, under the superintendence of said West as foreman, was being propelled at a rapid rate of speed down a long and steep grade, and plaintiff was on the front end of said car, propelling the lever of said car under the direction and superintendence of said foreman, said foreman negligently and recklessly applied the brakes to the wheels of said car with too much force and suddenness, and negligently checked the speed of said car suddenly and without warning, whereby plaintiff was violently thrown from said car, and in front thereof," was run over, and injured. The second count alleged that, on the day specified, "said car was being propelled at a rapid rate of speed," at a certain place on the defendant's track, "under the charge and control of said foreman, and plaintiff was working the lever at the forward end of said car, under the direction of said foreman; and said foreman, negligently, carelessly and recklessly, applied the brakes to the wheels of said car with great force and suddenness, without warning or signal, whereby the speed of said car was suddenly and violently checked, and plaintiff was thereby violently thrown from said car," &c.

There was no demurrer to either count of the complaint, but, after verdict for the plaintiff for \$6,000, the defendant moved in arrest of judgment, and specified twelve alleged defects in the complaint, as grounds for an arrest of judgment; all of which were overruled and refused. The record shows that the defendant filed three pleas: (1) that the allegations of the complaint are untrue; (2) a denial of each and every allegation of the complaint; (3) not guilty. If any other pleas were filed, the record does not show it, only reciting that the trial was had on issue joined.

The bill of exceptions purports to set out all the evidence introduced on the trial, and shows several exceptions reserved by the defendant; but a summary of the evidence is not necessary to an understanding of the points decided by this court. At the request of the plaintiff, the court gave the following charges to the jury: (1.) "It is the duty of the jury to weigh the evidence, and not merely to count the witnesses." (2.) "If the jury believe from the evidence that West knew that the persons operating the hand-car were at times in the habit of turning loose the lever when the car was running down grade, and that he applied the brake at a place where they were not accustomed to stop, so as to check the speed of the car with unnecessary and

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dangerous suddenness, without notice to the persons operating the same, or looking to see whether they were holding to the lever, then such act of West was negligence."

(3.) "The court leaves it to the jury to say whether, under the evidence in the case, the plaintiff was guilty of contributory negligence."

The defendant excepted to each of these charges as given, and also to the refusal of twenty-three (23) charges asked in writing. The first charge instructed the jury that they must find for the defendant, if they believed the evidence; the second, that they must find for the defendant under the first count; the third, that they must find for the defendant under the second count, and the others were as follows:

(4.) "It is the duty of the jury to reconcile conflicting testimony, and they must say, if they can determine, who has told the truth; and if they can not say who has told the truth, then they must find the facts, so far as there is conflict, not proven in the case; and if such facts are necessary to be proven in order for plaintiff to recover, they must find for the defendant."

(5.) "It is necessary in order that plaintiff recover in this action, for the jury to find that it was safer for the plaintiff to have hold of the handle of the lever than not to have hold of it, and further to find that his not having hold of the handle of the lever at the time of his injury was the proximate cause of his injury; and if the jury find that it was safer for the plaintiff to have hold of the handle of the lever than not to have hold of it, and that his not having hold of the handle of the lever at the time of plaintiff's injury was the proximate cause of his injury, then the plaintiff was guilty of contributory negligence as matter of law, and they must find for defendant."

(6.) "If it was the custom for the section foreman, West, to give no notice of the application of the brake before applying it, when he was near enough to apply the brake himself; that this custom was known, or should have been known, to the plaintiff, then it was not negligence for the section foreman to fail to give such notice when he applied the brake just before the plaintiff was hurt."

(7.) "Under the rule of the company introduced in evidence in this cause, if from the evidence you shall believe that the plaintiff, before and at the time he was hurt, had knowledge of such rule, it was the duty of the plaintiff to be cautious at all times, and to be prepared at all times for the passage of both regular and extra trains."

(8.) "If you believe from the evidence that defendant's

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section foreman did not give plaintiff any notice that he was about to apply the brake before he did apply the brake, and that such failure to give notice was the proximate cause of plaintiff's injury, then you must find for defendant."

(9.) "Under the evidence in this case, the failure of the section foreman to give notice before he applied the brake that he was going to apply the brake, was not negligence."

(10.) "If it was less dangerous for the plaintiff to keep his hand all the while on the handle of the lever, than to turn it loose while it was down and hold on to it only while it was up, and if it was practicable for the plaintiff to hold on to the handle all the while, then it was negligence for the plaintiff not to hold to the handle of the lever all the while."

(11.) "If you believe from the evidence that the car had reached a point about where the section foreman was accustomed to stop it, and that the plaintiff knew of this custom, then it would be negligence on the part of the plaintiff for him not to be prepared for the stopping of the car at such place."

(12.) "If you believe from the evidence that the car had reached a point about where the section foreman was accustomed to stop it, and that the plaintiff knew of this custom, then it would be negligence on the part of the plaintiff not to expect the car to stop at such place, and be prepared for such stop."

(13.) "Under the evidence in this case, the jury are not authorized to find that defendant's hand-car was stopped in an unusual and negligent way."

(14.) "If you believe from the evidence in this case that the lever-car was going at the rate of eight or ten miles an hour, or as fast as a man could run; that the plaintiff was standing on his feet with his back turned towards the direction in which the car was going, with the handle of the lever just in front of him, moving up and down, but not so fast but that plaintiff could keep his hand on the handle as it went up, and failed to keep his hand on it as it went down; that while it was down, and while plaintiff's hand was off the handle, the section foreman, without notice to the plaintiff, applied the brake to stop or check the speed of the car; that the checking of the car under such circumstances caused the plaintiff to lose his balance and fall from the car; that his failure to keep his hand on the handle contributed to his injury, the brake being applied when plaintiff's hand was off the handle; then you must find for defendant."

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(15.) "If you believe from the evidence that the plaintiff's failure to have his hand on the handle of the lever at the time the brake was applied was partly the cause of his injury, then you must find for the defendant."

(16.) "I charge you, that it was negligence, under the evidence in this case, for the plaintiff to stand on the car (while it was running at the speed it was going at) with his hand off the handle of the lever, if you believe from the evidence that at such time, and while going at such speed, it was practicable for the plaintiff to keep his hand on the handle."

(17.) "I charge you that a lever-car is not a car within the meaning of sub-division five of section 2590 of the Code of Alabama."

(18.) "If the evidence leaves the jury in doubt and uncertainty as to whether plaintiff's injury was caused by his having received no notice from the section foreman that he was going to apply the brake before he did apply the brake, they must find for defendant."

(19.) "If the jury find that the only benefit which the plaintiff would have derived from being notified by the section foreman that he was about to apply the brake, before he did apply the brake, was that it would have given the plaintiff an opportunity to have caught hold of the handle of the lever before he fell from the car, then the jury are not authorized to charge the defendant because of such want of notice."

(20.) "If the jury find from the evidence that the plaintiff did not have hold of the handle of the lever immediately before the time he fell from the hand-car, and further believe that plaintiff would not have fallen from the hand-car if he had hold of the handle of the lever, immediately before the time he fell from the hand-car, then they must find for defendant."

(21.) "Under the evidence in this case, it was not negligence on the part of defendant's section foreman to fail to notify plaintiff that he was about to apply the brake before he did apply the brake."

(22.) "If the jury believe from the evidence that it would have been safer for the plaintiff to have had hold of the handle of the lever immediately before he fell off the hand-car, and that he fell off of the hand-car because he did not have hold of the handle of the lever immediately before the time he fell, then they must find that plaintiff was guilty of negligence which contributed to his injury, and he can not recover in this action."

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(23.) "Unless the jury find from the evidence that it would have been safer for the plaintiff to have had hold of the handle of the lever than not to have had hold of the handle of the lever immediately before he fell off the hand-car, and further find that his not having hold of the handle of the lever immediately before he fell off the hand-car was the proximate cause of his injury, they must find for defendant."

HEWITT, WALKER & PORTER, and WALLACE PRATT, for appellant, submitted an elaborate printed argument, in which they discussed each of the assignments of error, 35 in number, and also filed two written arguments in support of their application for a rehearing. They relied mainly on the following points and authorities: (1.) The complaint shows no cause of action, because it shows that the plaintiff's injury was received in the operation of a lever-car, or car moved by hand; and such a car, it is insisted, is not within the purview of the statute on which the action is founded. The word *car*, as found in the statute, was added by the codifiers, and must be construed in connection with the words associated with it, all of which show that the statute has reference only to cars which are intended to be drawn by a locomotive engine, though they may not be so drawn at the time of the injury; and the obvious reason is, that a hand-car, or lever-car, is not within the mischief intended to be remedied, but is as easily controlled and managed as a team hitched to a wagon. (2.) The question propounded to the plaintiff, as to the speed of the car, called for illegal evidence, and the answer ought to have been excluded.—*Kuhn v. Railroad Co.*, 70 Iowa, 561; *Railroad Co. v. Hundley*, 38 Mich. 537. (3.) As to other rulings on evidence, see *L. & N. Railroad Co. v. Watson*, 90 Ala. 68; *Railroad Co. v. Propst*, 83 Ala. 526; *Seals v. Edmondson*, 71 Ala. 509; *Railroad Co. v. Hall*, 87 Ala. 708; 71 Ill. 366; 55 Iowa, 92; *Taylor v. Monroe*, 43 Conn. 36; 89 Amer. Dec. 596, note; 22 Amer. Rep. 592; 111 N. Y. 553. (4.) The first charge given at the instance of the plaintiff was argumentative; and the second was abstract, misleading, and erroneous.—*Railway Co. v. Calderwood*, 89 Ala. 247; *Railroad Co. v. Bayliss*, 74 Ala. 159; *Railroad Co. v. Jones*, 71 Ala. 487; *Cook v. Railroad Co.*, 67 Ala. 540; 17 Atlantic Rep. 7; 15 Amer. & Eng. R. R. Cases, 187; 44 *Ib.* 529; 38 *Ib.* 25; 26 Iowa, App. 356; Beach Contr. Neg., 157. (5.) There was no proof of any negligent act on the part of the foreman, and the several charges asked properly pre-
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sented that question in its different phases.—*Thompson v. Duncan*, 76 Ala. 334; *Railroad Co. v. Walters*, 91 Ala. 435; 15 Amer. & Eng. R. R. Cases, 187; 44 *Ib.* 529; 38 *Ib.* 25; 21 *Ib.* 535; 26 Iowa, App. 356; 17 Atlantic Rep. 7; 35 N. W. Rep. 866; 111 N. Y. 550; 116 N. Y. 628; 14 Amer. & Eng. Encyc. Law, 903, § 19; *Couch v. Watson Coal Co.*, 5 Cent. L. J. 108. (6.) The plaintiff did not exercise that degree of care which a prudent man would have exercised under the circumstances, and his contributory negligence precludes a recovery.—*L. & W. Railway Co. v. Bradford*, 86 Ala. 563; *Woodward Iron Co. v. Jones*, 80 Ala. 123; *Campbell v. Lunsford*, 83 Ala. 512; *C. & W. Railway Co. v. Bridges*, 86 Ala. 455; *Wilson v. L. & N. R. R. Co.*, 85 Ala. 269; *R. & D. Railroad Co. v. Chasteen*, 88 Ala. 591; *L. & N. Railroad Co. v. Hall*, 87 Ala. 708; *Lathrop v. Fitchburg R. R. Co.*, 150 Mass. 423; *Humphreys v. Railroad Co.*, 10 S. E. Rep. 39; *Smith v. Railroad Co.*, 5 S. E. Rep. 896; 16 Pac. Rep. 131; 11 Amer. & Eng. R. R. Cases, 115; 34 *Ib.* 488; 27 *Ib.* 216; Shear. Negligence, 142, note 11; Patterson's Railway Accident Law, § 66; 2 How. Pr., N. S., 416. (7.) The defense of contributory negligence was available under the general issue.—*Gov. St. Railway Co. v. Hanlon*, 53 Ala. 76; *Carter v. Chambers*, 79 Ala. 223; *L. & N. Railroad Co. v. Perry*, 87 Ala. 392; *Pryor v. L. & N. Railroad Co.*, 90 Ala. 32; *Geo. Pac. Railway Co. v. Hissong*, 91 Ala. 514; *Holland v. Tenn. Coal, Iron & R. R. Co.*, 91 Ala. 444; *R. & D. Railroad Co. v. Black*, 9 So. Rep. 568; *Ensley Railway Co. v. Chewning*, 93 Ala. 24; *Railway Co. v. Davis*, 92 Ala. 300; *Railway Co. v. Lee*, 92 Ala. 262; *Railway Co. v. Calderwood*, 89 Ala. 247. These decisions have settled this question as a rule of practice, and they are sustained by the decisions of other courts.—*Bridge v. Grand Junction Railway*, 2 M. & W. 214; *Holden v. New Gas Co.*, 54 E. C. L. Rep. 14; *Cunningham v. Lynn*, 22 Wis. 245; 23 Minn. 307; *Steele v. Burkhardt*, 104 Mass. 59; *Railroad Co. v. Rutherford*, 29 Ind. 82; *Turnpike Co. v. Baldwin*, 57 Ind. 86. See, also, *Thompson on Negligence*, 1179; *Shear. & R. Negligence*, § 113. (8.) The record shows that the defense of contributory negligence was in issue before the court and jury; that evidence was introduced, without objection, relevant only to that issue, and that charges were given and refused bearing on it. Under these circumstances, this court will presume that the issue was properly presented, either by technical plea, or by waiver of objection to the want of it; will hold the plaintiff to the case on which he relied in the court below, and will not allow a technicality to defeat a meritorious defense.

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Prior v. Beck, 21 Ala. 393; *Eastland v. Sparks*, 22 Ala. 607; *Lucas v. Hitchcock*, 2 Ala. 287; *Castleberry v. Pierce*, 2 S. & P. 141; *Jennings v. Cummings*, 9 Porter, 310; *Barney v. Bush*, 9 Ala. 345; *Bettis v. Saint*, 28 Ala. 214; 60 Amer. Dec. Dec. 560; *Stanley v. Br. Bank*, 23 Ala. 652; *Howell v. Reynolds*, 51 Mo. 154; *Insurance Co. v. Harlan*, 72 Mo. 202; *Young v. Glasscock*, 79 Mo. 579; *Walker v. Owen*, 79 Mo. 563. (9.) No recovery could be had under the second count, which alleged that the injury was inflicted *recklessly*, because there was no evidence which tended to show anything more than simple negligence on the part of the foreman.—*Railroad Co. v. Coulton*, 86 Ala. 131; *Railroad Co. v. Johnston*, 79 Ala. 436; *Railroad Co. v. Jacobs*, 92 Ala. 187; *Winn v. H. A. & B. Railroad Co.*, 93 Ala. 306; *A. G. S. Railroad v. Frazier*, 93 Ala. 45.

TALIAFERRO & HOUGHTON, in their original brief, argued each of the assignments of error in order, and also filed a written argument in reply to the application for rehearing. On the questions of evidence, they cited *Railroad Co. v. Crist*, 116 Ind. 446; 19 Amer. St. 805, 875; 119 Mich. 105; 36 Iowa, 462, 662; *Gibson v. Hatchett*, 24 Ala. 201; *Otis v. Thom*, 23 Ala. 469; *Railroad Co. v. Edwards*, 41 Ala. 567; *Tanner v. Railroad Co.*, 60 Ala. 621. As to the question of negligence on the part of the foreman of the car, they cited *Frazier v. L. & N. Railroad Co.*, 81 Ala. 185; *Cook v. Central Railroad Co.*, 67 Ala. 533; *Tanner v. L. & N. Railroad Co.*, 60 Ala. 621; *Railroad Co. v. Phillips*, 112 Ind. 59, or 2 Amer. St. 155. They contended, also, that the question of contributory negligence was not raised by the pleadings, and that this court would not presume, in favor of a reversal, that such a plea was filed; citing to these points the following cases: *Petty v. Dill*, 53 Ala. 641; *Howland v. Wallace*, 81 Ala. 238; *Daniel v. Hardwick*, 88 Ala. 557; *Slaughter v. Swift*, 67 Ala. 494; *Harper v. Weeks*, 89 Ala. 577; *Cook v. Central Railroad Co.*, 67 Ala. 533; *Thompson v. Duncan*, 76 Ala. 334; *Tanner v. L. & N. Railroad Co.*, 60 Ala. 621; *Bingham v. Carlisle*, 78 Ala. 243; *Railroad Co. v. Chambers*, 79 Ala. 338; *Dent v. Smith*, 15 Ala. 286; *Eastland v. Sparks*, 22 Ala. 607; *Gray v. Raiborn*, 53 Ala. 40; *Marriott v. Lewis*, 25 Ala. 332; *Railroad Co. v. Perryman*, 91 Ala. 413.

WALKER, J.—No demurrer was interposed to the complaint. The defendant moved to arrest judgment on the verdict rendered by the jury. This motion was predicated upon the ground that the complaint did not show any cause
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of action, and would not support the judgment. The motion was properly overruled, if the complaint contained a substantial cause of action.—Code of 1886, § 2835. In support of the motion it is urged, that the complaint does not allege a cause of action against the defendant as the employer of the plaintiff, unless the averments thereof show that the injury complained of was caused by reason of such negligence as is specified in subdivision 5 of section 2590 of the Code of 1886; and that, in imputing the injury to the negligence of a person in the service or employment of the defendant who had charge or control of “a car propelled by hand, called a lever-car,” the complaint does not show that such person had charge or control of a “car” within the meaning of that word as used in the statute.

Sub-division 5 of section 2590 of the Code is in these words: “When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway.” In the corresponding sub-division of the original act, upon which this section of the Code is founded, the language is, “by reason of the negligence of any person in the service of the employer, who has the charge or control of any signal, switch, engine, or train upon a railway, or any part of the track thereof.”—Acts of Ala. 1884-85, p. 115. It thus appears that the words “points,” “locomotive” and “car,” were introduced by the codifiers. A result of the change is to enable an employe to maintain an action against his employer, for an injury caused by reason of the negligence of any person in the service or employment of the master or employer who has the charge or control of any car upon a railway. It is argued that, as the word “car” is used in connection with the words “locomotive,” “engine” and “train,” it was intended to mean a vehicle used on a railway for the transportation of passengers or freight, which is propelled by a locomotive or engine, and forms a part of a train. It is true, that in determining the true sense of a word which has a variety of meanings, regard should be had to the other words with which it is associated, and to the subject-matter in relation to which it is used. As the clause of the statute which is under consideration has reference to injuries received in railway service, it seems plain that the word “car,” as here used, does not include such vehicles moved on wheels as are not used on railways, though there are such vehicles which may properly be called cars. It is not difficult to

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select from the several definitions of the word "car," as found in the dictionaries, one which is applicable to the word as used in the statute. The Century Dictionary gives this, among other definitions: "a vehicle running upon rails." One of Webster's definitions is: "a vehicle adapted to the rails of a railroad." We find nothing in the language of the statute to suggest that the word as there used was intended to convey a meaning which excludes the idea of a hand or lever-car. Such cars are used in the ordinary business of railroads. Employes who ride upon them, or who are in the discharge of duties on or near to tracks over which they are propelled, are liable to be injured in consequence of the negligent handling of them. It is plain that subdivision 5 of the statute covers the case of an injury caused by reason of the negligence of a co-employe who has the charge or control of a car, though such car is at the time in no way connected with an engine, and is not a part of a train. The negligent handling of a detached passenger or freight-car may cause an injury which is actionable under the statute. It is not necessary that the car be connected in any way with a locomotive, or with other cars forming a train. If the car is adapted to the rails of a railroad, and is used in the business of railroads, we think that it is none the less within the meaning of the word as used in the statute because it is made to be propelled by hand. The motion in arrest of judgment was properly overruled.

2. The complaint attributes the injury complained of to the negligence of the foreman in applying the brake without warning while the car was being propelled at a rapid rate of speed, and thereby suddenly checking its speed and causing the plaintiff to be violently thrown off, in front of the moving car, so that it ran against and over him. Evidence tending to show the speed of the car was competent in support of the allegations of the complaint in that regard. On this subject the plaintiff stated: "I would think the lever-car was going at the rate of eight or ten miles an hour." His counsel then asked him this question: "About how fast, compared to a man running?" The defendant's objection to the question having been overruled, the witness answered: "Well, sir, it was running faster than a man could run." The defendant's motion to exclude the answer was also overruled. It is often impossible for the appearance which was presented by a moving object to be conveyed to the minds of the jury so clearly that they could form a satisfactory conclusion as to its velocity, without the aid of the opinions of eye-witnesses. Conclusions

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upon such a question as the speed of a moving vehicle are necessarily, in most instances, based upon the opinions of persons who observed it. Because no better evidence can ordinarily be obtained, or the facts can not otherwise be presented to the jury, the law admits the opinion of ordinary witnesses, derived from observation, as evidence on the question of the speed at which an object was moving at a certain time. Such opinions may often be no more definite than that the object in question was moving at a greater or less rate of speed than other familiar objects which the witness had been accustomed to observe in motion. That the witness is unable to state that the object in question was moving at the rate of a certain number of miles in an hour would not necessarily render his opinion useless as an aid to the jury. Assistance in coming to a conclusion on such a question may be derived from a statement that the object was going slowly, or at a snail's pace, or no faster than a man walks, or faster than a man could run. The opinions are admitted to enable the jury to realize, as far as possible, the impression as to speed made by the moving object upon the mind of one who saw it. It would be more satisfactory if the admissibility of such opinions could be made to depend upon their conformity to some definite standard of clearness or accuracy in their formation and expression. It is not practicable, however, to fix any such standard. The vagueness of the opinion would only go to the weight of the testimony, and not to its admissibility. As the statement made by the plaintiff in answer to the question above referred to was admissible as the expression of his opinion based upon observation, we do not think that opinion should have been excluded because it was not more definite; and as the question did not elicit incompetent evidence, no injury resulted to the defendant in consequence of its allowance.—Lawson on Opinion and Expert Evidence, pp. 460-462-465; *Evansville & T. H. R. R. Co. v. Crist*, 116 Ind. 446; s. c., 9 Amer. St. Rep. 865, and notes; *Gugenheim v. Lake Shore & M. S. R. Co.*, 32 Am. & Eng. R. Cases, 89.

3. There was no evidence tending to show that any one on the lever-car heard an extra train coming, or that a train was in fact approaching from either direction when the brake was applied by the foreman. The inquiry as to what the section-foreman and the section-hands should do with a lever-car on which they are riding, when they hear a train coming, could not tend to throw any light on the question of the foreman's duty in the circumstances

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shown by the proof. It could only tend to divert the minds of the jury to lay before them evidence to show what would have been the duty of the men on the car under an imaginary state of circumstances, different from that developed by the proof in the case on trial. The objection to the question calling for such evidence was properly sustained.

4. The question in reference to the danger incurred by one who fails to hold on to anything while standing on a moving lever-car called for evidence which, in connection with the other proof in the case, would have tended to show that the plaintiff was negligent in that regard. Contributory negligence is in its nature defensive, and the burden of proof to show it is upon the party who relies upon it. The pleas interposed by the defendant in this case did not go beyond a traverse of the allegations of the complaint. If contributory negligence on the part of the plaintiff was relied upon as matter of defense, it should have been specially pleaded. A denial of the charge of negligence made against the defendant in no way involves the averment of negligence on the part of the plaintiff. The defendant's pleas did not present any issue of contributory negligence.—*Thompson v. Duncan*, 76 Ala. 334; *Mobile & Montgomery Ry. Co. v. Crenshaw*, 65 Ala. 566; *Louisville & Nashville R. Co. v. Hall*, 87 Ala. 708; *North Birmingham S. Ry. Co. v. Calderwood*, 89 Ala. 247; *Beach on Contributory Negligence*, § 157. It is proper to exclude evidence which is pertinent only to an issue which is not presented by the pleadings. For this reason, the objections to the questions as to the plaintiff's negligence in letting go the handle of the lever-car were properly sustained.

5. The question propounded by the counsel for the defendant to the witness West on his direct examination, to which an objection was sustained, was so framed as to suggest the answer desired. The witness had just stated that he never ran on a curve without stopping to ascertain whether any trains were coming. To ask him, immediately after this statement, if it was his duty to make such a stop or not, was well calculated to indicate to him what answer was expected. The court was justified in sustaining the objection to the question, because of its leading character under the circumstances.

6. It is true that it is the duty of the jury to weigh the evidence, and not merely to count the witnesses introduced by the respective parties. We are unable to perceive how

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any injury could have resulted to the defendant from the giving of the charge to this effect.

7. It was shown without contradiction that, when the brake was applied, the plaintiff was standing in the front end of the car, facing in the direction from which the car was coming, and that he was assisting in working the handle of the lever on that end of the car; that in the position he was in there was nothing he could hold to but the handle of the lever. There was evidence tending to show that, when the lever-car was under good headway the men working the lever would at times turn it loose without holding on to anything else; and that, on the occasion in question, the plaintiff in assisting to work the lever would let go the handle as he pushed it down. There was evidence to support a finding that West knew that the persons operating the hand-car were at times in the habit of turning loose the lever, when the car was running down grade. If with this knowledge, and at a place where they were not accustomed to stop, he applied the brake so as to check with unnecessary and dangerous suddenness the speed of the car when it was running down grade, without notice to the persons operating the same, and without looking to see that such persons were holding to the lever, the inference of negligence from such conduct is clear and certain. The sudden checking of the car without notice necessarily involved the danger of a fall to a person who was standing upon it without support. If the state of facts hypothesized in the second charge given at the request of the plaintiff had been submitted to the court as a special finding of the jury, the conclusion of negligence could have been pronounced as a matter of law. The charge submitted the questions of fact for the determination of the jury from the evidence. There was no error in instructing them that, if they believed from the evidence that such was the state of facts, then the act of the foreman was negligent.—*Louisville & Nashville R. Co. v. Perry*, 87 Ala. 392; *East Tenn. Va. & Ga. R. Co. v. Bayliss*, 74 Ala. 150; *City Council of Montgomery v. Wright*, 72 Ala. 411.

8. As the defense of contributory negligence was not presented by the pleadings, no injury could have resulted to the defendant by the charge stating that "the court leaves it to the jury to say whether, under the evidence in this case, the plaintiff was guilty of contributory negligence." This charge should have been refused; but the giving of it could work no injury to the defendant, as the effect was to allow the defendant the benefit of a defense which had not been set up.

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Charges 5, 7, 10, 11, 12, 14, 15, 16, 20, 22 and 23 requested by the defendant were instructions upon the question of the plaintiff's contributory negligence. As that question was not presented by the pleadings, all of them were properly refused on that ground, without regard to other defects in several of them.

9. A proposition of the fourth charge requested by the defendant is, that if the jury can not say who has told the truth, then they must find the facts, so far as there is conflict, not proven in this case, and if such facts are necessary to be proved in order for plaintiff to recover, they must find for the defendant. A jury may not be satisfied that any one witness in the case has told the truth throughout his testimony, and yet they may be able, from a fair consideration of all the evidence before them, to arrive at a satisfactory conclusion in reference to the matter presented for their determination. They should not be instructed to make up an issue as to the testimony of each witness, and render a verdict as to its truth or falsity. In weighing all the evidence, it can not be said to be their duty to reject the entire testimony of a witness who has erred in some material particular. An untrue statement may be attributable to an honest mistake, and may be reconcilable with the absence of any intention to misrepresent the facts. If the jury can satisfactorily determine the issues of fact presented to them by weighing the evidence and sifting out the truth, their conclusion would not be vitiated because they could not say that the witnesses upon whose testimony their verdict is based have stated nothing but the truth of the matter as they have found it. The charge was properly refused.

10. Although there was no custom to give notice before applying the brake, yet it is plain that it might be applied to check the car in such a manner, and under such circumstances, that a failure to give notice would render the act negligent and unnecessarily perilous to other persons on the car. There was evidence tending to show that the foreman applied the brake so as to check the car very suddenly, while it was in rapid motion, and at a place where it was unusual to make a stop. It was for the jury to say from the evidence whether the brake was applied in such a manner as to render the act negligent. Charges 6, 8, 9, and 21 requested by the defendant were properly refused, because they assert, in effect, that the absence of a custom on the subject would preclude the imputation of negligence to the act of the foreman in applying the brake without notice

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under any circumstances. Though the jury were in doubt and uncertainty as to whether plaintiff's injury was caused by his having received no notice of the intended application of the brake, yet they would not be justified in finding for defendant if they believed from the evidence that the injury to the plaintiff was caused by the negligence of the foreman in checking the speed of the car suddenly and without warning, as alleged in the complaint. If the injury could properly be imputed to the negligence alleged, it was not necessary that the jury should be able to affirm that it was caused solely by the failure to give warning, which was but one feature of the negligence charged. This consideration discloses the incorrectness of charge 18 requested by the defendant. Charge 19 was misleading and confusing in singling out an isolated feature of the negligence alleged, and was calculated to convey the impression that the injury must be attributable solely to the want of notice. The two charges last mentioned ignore facts other than those hypothetically stated which there was evidence tending to prove, and the existence of which would avoid the legal conclusions respectively stated.—*White v. Craft*, 91 Ala. 139.

As has been already indicated, there was evidence from which the jury would be authorized to find that the injury was caused by the checking of the car in an unusual and negligent way. Charge 13 requested by the defendant was properly refused, because it asserted that there was no such evidence.

The principal argument suggested in support of the correctness of charges 1, 2 and 3 requested by the defendant is the one which has already been considered and disposed of in the review of the action of the lower court in overruling the motion in arrest of judgment.

We have discovered no reversible error in the record, and the judgment must be affirmed.

(In response to application for re-hearing.)

WALKER, J.—It is insisted in the application for a re-hearing that the defense of contributory negligence could be made under the general issue. The scope of that plea is prescribed by the statute. It puts in issue "all the material allegations of the complaint."—Code of 1886, § 2675. Of this statutory plea it was said in *Petty v. Dill*, 53 Ala. 645: "It cast on the plaintiffs the *onus* of proving every material allegation of the complaint; it limited the defense to evidence in disproof of them. No matter in avoidance of the

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allegations of the complaint, or in excuse or justification of the wrongful act imputed to the defendant, was within the issue found. All such matters the statute required to be specially pleaded. . . . If it was intended to confess and avoid, . . . the matter of avoidance should have been specially pleaded. The general denial of the allegations of the complaint was not sufficient to put it in issue." It is well settled, that any defense, special in its nature, or reaching beyond a mere denial of the material allegations of the complaint, is required by the statute to be presented by a special plea.—*Howland v. Wallace*, 81 Ala. 238; *Daniel v. Hardwick*, 88 Ala. 557; *Slaughter v. Swift*, 67 Ala. 494. The question, then, is, does a statement of a cause of action based upon the charge that the defendant was negligent, involve the assertion that no negligence on the part of the plaintiff proximately contributed to the injury of which he complains, so that a mere denial of the allegations of the complaint casts the burden on the plaintiff to show that he was not guilty of contributory negligence? As shown in the opinion already delivered in this case, this court has several times decided that contributory negligence is in its nature defensive, and that it is not incumbent on the plaintiff in the first instance to negative the defense either in his pleading or in his proof. Contributory negligence is none the less defensive because the proof of it is disclosed in the evidence which the plaintiff himself offers in support of the charge that the defendant was negligent. The ruling in *North Birmingham Street Railway Co. v. Calderwood*, 89 Ala. 254, that the burden of proving contributory negligence is not on the defendant when it is shown by the evidence introduced by the plaintiff, has not been adhered to. The rule on this subject which we regard as correct is thus stated in a later case; "The *onus* in this regard is in all cases on the defendant, though plaintiff's evidence sometimes relieves from the necessity of discharging it."—*Geo. Pac. Railway Co. v. Davis*, 92 Ala. 312. The defendant need not introduce evidence in support of a special plea, if the evidence introduced by the plaintiff has already established the defense. But the source from which the evidence to support a defense comes does not determine that it was not purely defensive matter, and available only under a special plea, or that the burden to prove it was not on the defendant. The term "contributory negligence," instead of implying such a denial of the material allegations of the complaint as is made by pleading the general issue, implies just the contrary. The theory of this special defense is, that the de-

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defendant was negligent, but that the negligence of the plaintiff conduced to the injury complained of. The defense is in the nature of a confession and avoidance. It may be fully made out without denying a single allegation of the complaint. The pith of it is, that admitting that the defendant was negligent as charged, yet the plaintiff is not entitled to recover because his own negligence proximately contributed to the injury. The plea of contributory negligence, when standing by itself, admits the negligence charged in the complaint.—*L. & N. R. R. Co. v. Hall*, 87 Ala. 708; *Carter v. Chambers*, 79 Ala. 229; *Geo. Pac. Railway Co. v. Lee*, 92 Ala. 270. Now, the very essence of the general issue is a denial of all the material allegations of the complaint. When negligence is counted on, the fact of negligence is certainly denied by the general issue. The same words can not at once be a denial and an admission of the same thing. The statutory general issue does not palter in a double sense. It does not admit what it denies. True, it was said in *Government St. R. R. Co. v. Humlon*, 53 Ala. 70, that the defense of contributory negligence was available under the general issue. The statement of this proposition was not necessary to the decision in that case. It is stated in the report that the record did not disclose upon what pleas the case had been tried. Such being the case, as it appeared that the defense of contributory negligence was considered without objection on the trial, it could have been presumed, in favor of the correctness of the rulings of the lower court, that the defense was presented by a special plea.—*Brinson v. Edwards*, 94 Ala. 447. The proposition, however, that the defense of contributory negligence could have been availed of under the general issue, was simply asserted without discussion or argument, and the only authority cited in support of it was *Steele v. Burkhardt*, 104 Mass. 59. The ruling of the Massachusetts court in the case cited is put upon the ground that the plaintiff's allegation that the injury happened in consequence of the negligence of the defendant implies that there was no negligence on the part of the plaintiff which contributed to the injury, and throws upon him the burden of proving that he was free from such negligence. It is now well settled in this State that no such implication is involved in the plaintiff's allegation that the defendant's negligence caused the injury, and the burden is not primarily on the plaintiff to negative fault on his part. During the sixteen years that have elapsed since the case above cited from 53 Ala. was decided, many phases of the defense of contributory negli-

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gence have been passed on by this court. The proposition that that defense is available under the general issue has not been reaffirmed. This court has declined to reaffirm the proposition.—*Montgomery & Eufaula R. Co. v. Chambers*, 79 Ala. 342. In *Rich. & Danv. R. Co. v. Hammond*, 93 Ala. 181, it was distinctly recognized, that the defense is one requiring a special plea to support it. As the nature of the defense has been brought out in clearer light in the later decisions, its distinctive character as a special defense has been fully established. A defense which in its very nature concedes the truth of the charge against the defendant, but avoids the effect of the concession by making a counter charge against the plaintiff, can not reasonably or logically be availed of under a plea which limits the defendant to evidence in disproof of the charge made in the complaint. We adhere to the ruling that the defense of contributory negligence must be made by a special plea. On this point the case of *Government St. R. R. Co. v. Hanlon*, *supra*, must be overruled.

Our attention has been called to several cases in which the defense of contributory negligence was considered by this court, though only the general issue was pleaded. *Pryor v. Louis. & Nash. R. R. Co.*, 90 Ala. 32; *Hissong v. Rich. & Danv. R. R. Co.*, 91 Ala. 514. In neither of those cases did the court notice the point. Nothing was said on the subject. Those cases are not authorities against a proposition which was not mentioned therein in any way. Former decisions are entitled to weight, under the doctrine of *stare decisis*, only when the proposition in support of which they are cited was considered and passed on.

The defendant's pleas, three in number, are set out in their proper place in the record. This court can not indulge the presumption that other pleas were filed, especially as the indulgence of such presumption would involve the imputation of error to the trial court. When the record fails to set out the pleas, but it appears that special defenses were considered by the trial court without objection, to avoid the imputation of error, it may be presumed that such defenses were supported by proper pleas. But when a complaint and pleas thereto are found in the record, there is no more room for a presumption that other and different pleas were interposed, than there would be for a presumption that allegations other than those which the record discloses were added to the complaint by amendment.

It is also insisted that the conduct of the plaintiff on the trial, as disclosed in the bill of exceptions, shows that he

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treated the defense of contributory negligence as duly presented, and that he can not now claim that it was not raised by the pleadings. Conceding that the issues could be enlarged by consent without proper pleading, notwithstanding the rule laid down in *Burns v. Campbell*, 71 Ala. 294; the question, then, is, does the conduct of the plaintiff show that he consented to treat the defense of contributory negligence as properly presented? The evidence introduced by the plaintiff was confined to the support of the allegations of the complaint. It showed the position occupied by the plaintiff at the time of the accident, and the circumstances under which the foreman applied the brake. The defendant claimed that the plaintiff was negligent in not keeping hold of the lever while the hand-car was in motion, in not being prepared at all times for the stopping of the hand-car to let regular or extra trains pass, and in not anticipating that the brake might be applied at any time without warning. All the evidence to show that it was safer to hold on to something while the car was in motion, or that it was the duty of those on the car to be prepared at all times for the passage of trains, or that it was not usual to give notice of the application of the brake, was called out by the defendant. The plaintiff did not start either of these inquiries. The bill of exceptions shows that the plaintiff objected to evidence which was properly excluded because the issue of contributory negligence was not presented. Of course, no exception of the plaintiff, which was not sustained, is shown in the defendant's bill of exceptions. If the plaintiff objected to all the evidence offered by the defendant and admitted on the question of contributory negligence, the defendant's bill of exceptions would not show that such objection was made. There is nothing in it to show that the plaintiff did not object to any of the evidence admitted against him. It is not to be inferred that the plaintiff did not object because his objections do not appear in the defendant's bill of exceptions, where it is not to be supposed that they would be noted if they were unavailing. The plaintiff did offer evidence in rebuttal of the evidence introduced by the defendant on the question of contributory negligence. This did not show that he waived the irrelevancy of the defendant's evidence on this subject. It is not error to permit the rebuttal of illegal evidence with illegal evidence.—*Gibson v. The State*, 91 Ala. 64. There is nothing in the introduction of evidence to show that the plaintiff consented to treat the defense of contributory negligence as properly pleaded.

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It is further insisted that the action of the plaintiff in requesting a charge on the subject implies such consent. When the court permits the defendant to make a defense not presented by his pleas, the plaintiff may as effectually protect himself on the trial against this erroneous action of the court by showing the insufficiency of the evidence to support the defense, as by relying, in the appellate court, on the error of the trial court in treating such defense as properly presented. A claim by the plaintiff that the evidence does not support the defense, and his request for a charge to the jury in reference to the evidence on the subject, is not inconsistent with a contention on his part that there is no plea to support such defense, and does not involve a concession or agreement that such defense has been duly pleaded. We do not think that the action of the plaintiff in requesting charge No. 3, given at his instance, shows that he consented to treat the defense of contributory negligence as properly raised.

In the application for a re-hearing it is contended for the first time the plaintiff was not entitled to recover on the second count of the complaint, unless the evidence showed such recklessness on the part of the defendant, its agents or servants, as would avoid the defense of contributory negligence; and that there was no evidence tending to show such recklessness. On the strength of this proposition it is claimed that the general affirmative charge in favor of the defendant as to the second count of the complaint should have been given as requested. The count, in describing the manner in which the brake was applied by the foreman, charges that it was done "negligently, carelessly and recklessly." The question presented is, does the mere fact that the act is stated to have been reckless put upon the plaintiff the burden of making out such case that his own contributory negligence would not stand in his way of right to recovery? It has been decided in several cases that a charge that the act complained of was willful, or that it was knowingly done, can not be supported by evidence of mere negligence, not involving willfulness or knowledge of the danger.—*L. & N. R. R. Co. v. Johnston*, 79 Ala. 436; *L. & N. R. R. Co. v. Coulton*, 86 Ala. 129; *Birmingham Min. R. R. Co. v. Jacobs*, 92 Ala. 192; *Highland Ave. & B. R. Co. v. Winn*, 93 Ala. 306. And it has been held that a plea of contributory negligence to a complaint charging a willful infliction of injury by the defendant is bad on demurrer.—*A. G. S. R. R. Co. v. Frazier*, 93 Ala. 45. The word *willful* imports that the act to which it refers is done inten-

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tionally, purposely. This is not necessarily so with the word *reckless*. The latter word has a wide range of meaning. In its milder sense it may imply mere inattention to duty—thoughtlessness—indifference, carelessness, negligence; or import a heedless disregard of obvious consequences. Webster's Int. Dict.

In *Harrison v. The State*, 37 Ala. 154, the distinction was drawn between the words *willful* and *reckless*, as employed in reference to criminal acts. It was there said, "The word *willful*, when employed in penal enactments, has not always the same meaning. In this statute, it is used as the synonym of *intentional*, or *designed*—*pursuant to intention or design; without lawful excuse*. . . . The word *reckless* means 'heedless, careless, rash, indifferent to consequences.' Now, one may be heedless, rash, or indifferent to results, without contemplating or *intending* these consequences. As a general rule, there is a wide difference between intentional acts and those results which are the consequence of carelessness." The same distinction was recognized in a late case.—*Johnston v. State*, 92 Ala. 82. The distinction is not obliterated when the two words are used in characterizing civil torts instead of crimes. Now, the degree of recklessness which will avoid the defense of contributory negligence is such as implies a willingness or a purpose to inflict the injury complained of—a consciousness that the unwarranted conduct will inevitably or probably lead to wrong and injury.—*Ga. Pac. R. Co. v. Lee*, 92 Ala. 262. In charging recklessness in general terms, no more is necessarily implied than such mere negligence, thoughtlessness or inadvertence as could not be regarded as the equivalent of intentional wrong, and which, therefore, would be insufficient to overcome the defense of contributory negligence. A plea of contributory negligence can not be regarded as presenting no defense, because recklessness is charged in the complaint, unless it appears from the averments of the complaint that the recklessness charged amounted to more than mere negligence. There is nothing in the averments of the second count of the complaint in this case to show that the word was used in its harsher sense. There was evidence tending to show that the act of the foreman in applying the brake was reckless within the milder meaning of that word as above defined. The averments of the complaint by no means necessarily import that the objectionable act of the foreman was willful.

It is much to be regretted if the defendant has, in consequence of an erroneous statement in a former opinion

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delivered by this court, lost any of the benefits of a defense which was supposed to be presented by pleading the general issue. But since the date of the decision in which that statement was made, this court has several times so clearly marked the scope of the statutory plea of the general issue, and has also so fully discussed the characteristics of the defense of contributory negligence, that it is plain, in view of such later adjudications, that that defense must be presented by a special plea. We know of no rule that would authorize a reversal of the case in order to afford the defendant an opportunity to file additional pleas. In considering the refusal of the trial court to rule as requested by the defendant, we can look only to the case as found in the record. We discover no error therein of injury to the appellant. The application for a rehearing must be denied.

Arrington v. Savannah & Western Railroad Co.

Action by Contractor against Railroad Corporation.

1. *Construction of branch road by railroad corporation.*—A grant of corporate power to build and operate a railroad between specified *termini* carries with it the right to construct turn-outs, sidings, switches, stations and engine-houses, and all works and appendages usual in the convenient operation of a railroad; but the right to purchase, extend or construct a "branch road" on or from any point on its line is limited and governed by statutory provisions (Code, §§ 1587-8), and such purchase, extension or construction can only be made by a resolution of the board of directors, ratified and approved by a subsequent vote of the majority in value of the stockholders.

2. *Breach of contract by corporation; averments of complaint.*—In an action against a railroad company by a contractor for the construction of a branch road, alleging the execution of the contract and its breach by the defendant, it is not necessary further to allege that the construction of the branch road was authorized by resolution of the board of directors, ratified and approved by a vote of a majority of the stockholders in value; that being merely defensive matter, and the presumption being that such preliminary action was had before the work of construction was entered on.

APPEAL from the Circuit Court of Jefferson.
Tried before the Hon. JAMES B. HEAD.

WEBB & TILLMAN, for appellant, cited *Boulevard v. Davis*, 90 Ala. 211; *Ala. Gold Life Ins. Co. v. Central A. & M. Asso.*, Vol. 95.

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54 Ala. 73; *Nelms v. N. E. Mortg. Security Co.*, 92 Ala. 162; 1 Chitty's Pl., §§ 220-21; *Getz's Appeal*, 3 Amer. & E. R. R. Cases, 192; *Railroad Co. v. Speer*, 6 P. F. S. 335; *Railroad Co. v. Williams*, 4 Ib. 103; 12 Amer. & Eng. Encyc. Law, 943-4.

CHISOLM & WHALEY, *contra*, cited 1 Morawetz, Corporations, § 373; Green's Bryce's Ultra Vires, 717; *Turnpike Co. v. Railroad Co.*, 35 Md. 224; 5 McLean, 425; *C. Lime Co. v. Dismukes*, 87 Ala. 344; *Ala. Gold Life Ins. Co. v. Central A. & M. Asso.*, 54 Ala. 77; *Dudley v. Collier*, 87 Ala. 431; *Chambers v. Falkner*, 65 Ala. 454.

STONE, C. J.—The plaintiff, Arrington, sued the railroad corporation for the breach of an alleged executory agreement. There was a demurrer to the complaint as originally filed, which the court sustained. The plaintiff then filed two separate amendments, and a demurrer was sustained to each. No other amendment being offered, judgment final was rendered against the plaintiff, and from that judgment the present appeal is prosecuted. The demurrers raise the single question and inquiry, whether the complaint describes a contract which the corporation had authority to enter into. The case going off on demurrer, we will treat the averments in the complaint as the facts of the case.

The railroad company was incorporated under the general law of the State.—Code of 1886, §§ 1573 *et seq.* The corporation, through its proper contracting officer, entered into a written contract with the plaintiff, by which it employed him to do the grading for a branch, or spur-track, propose to be constructed. He entered upon the service, incurred heavy expense in preparing for it, did a part of the work, and was then discharged and not permitted to complete the job. He was ready and willing, and offered to comply with his contract. The damages claimed are the loss he alleges he suffered in being denied the privilege of finishing his agreed undertaking. He avers he could have realized the profits he specifies, if permitted to finish the grading.

The complaint, as originally filed, describes the track, the grading of which plaintiff avers he was employed to do, in the following language: "A certain branch line near its siding at Henry Ellen Station on its main line, to connect said main line with the Henry Ellen Coal Company's slope number one, a distance of about three-fourths of one mile." In the first amendment, the description is in the following

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terms, omitting the clause included in the brackets ; and the second amendment consisted in the insertion of the bracketed clauses : "Spur-track or switch near its siding at Henry Ellen Station on its main line, to connect said main line with the Henry Ellen Coal Company's slope number one—a distance of about three fourths of a mile [for the purpose of obtaining coal from said mines, both to use it as fuel in its own engines, and for the purpose of carrying it as freight over its main line], and that the said defendant possessed the power and authority to make and enter into such contract."

It may be stated as an axiomatic truth, that authority to do a particular thing carries with it the authority for employing the necessary means, and of doing every thing that is necessary and proper for the doing of the thing, or the completion of the enterprise. The central purpose of the projectors of a railroad is to construct, between *termini*, a continuous line of railroad track, for purposes of travel and transportation. But this purpose could not be made effective, if the projectors were denied all right to employ incidental and auxiliary agencies. Speaking of the charter of a railroad corporation, an able judge said : "This grant of power unquestionably carries with it the right to construct turn-outs, sidings, stations and engine-houses, and all works and appendages usual in the convenient operation of a railroad. A railroad without switches, sidings, turn-outs, and buildings for fuel, water, engines, stations, &c., would be useless in a great measure. They are essential to the operation of a road, and to the transportation of freight and passengers with security and dispatch."—*Phila. W. and Balt. R. Co. v. Williams*, 54 Penn. St. 103.

The appliances enumerated in the foregoing extract are those, and those only, which are necessary to the successful operation of a railroad as a line of travel or transportation. It is not supposed they include branch or spur-tracks proper, which are mere feeders of the main track, constructed for the purpose of increasing the business of the road, or for the convenience of an outside enterprise. These, not being necessary to the operation of the railroad, but resorted to as a means of increasing the emoluments of the adventure, stand on a different principle ; and the power of the road to construct them as a mere incident to its granted powers has given rise to much and varied judicial determination. We cite many authorities bearing on this question, but we do not consider it necessary to express an opinion on the naked inquiry, when unaffected by statutory enactment.—*Balt. & Vol. 95.*

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H. de Gr. Turnpike Co. v. Union Railroad Co., 35 Md. 224; *Matter of R. H. & L. R. R. Co.*, 110 N. Y. 119; *Sholl v. German Coal Co.*, 118 Ill. 427; *Rensselaer & S. R. R. Co. v. Davis*, 43 N. Y. 137; *So. Chicago R. Co. v. Dix*, 17 Am. & Eng. R. R. Cases, 157; *Mor. & Essex R. R. Co. v. Cen. R. R. of N. J.*, 12 Vroom, 205; *Ohio & E. Ill. R. R. Co. v. Wiltse*, 24 Amer. & Eng. R. R. Cases, 261; *P., W. & K. R. Co. v. B. Iron Works*, 36 Amer. & Eng. R. R. Cases, 531, and note; 12 Am. & Eng. Encyc. of Law, 942 *et seq.*, and notes; *Works v. Junction R.*, 5 McL. 425; *Conn. L. Ins. Co. v. C. C. & C. R. Co.*, 41 Barb. 9; *Getz' Appeal*, 3 Amer. & Eng. R. R. Cases, 186; *McAboy v. P. & C. R. Co.*, 20 Amer. & Eng. R. Cases, 314. See, also, Greene's Brice's *Ultra Vires*, 715, *et seq.*; *Ala. G. L. Ins. Co. v. Cen. A. & M. Asso.*, 54 Ala. 73; *City Council v. Hughes*, 55 Ala. 201; *Wilks v. Geo. Pa. Railroad Co.*, 79 Ala. 180; *Chewacla Lime Works v. Dismukes*, 87 Ala. 344; *Dudley v. Collier*, *Ib.* 431.

We have a statute bearing on this question, approved December 12, 1882.—Sess. Acts, 21; Code of 1886, §§ 1587–8. Its provisions are as follows: § 1587. “A corporation now existing, or which may hereafter be organized, for the building, constructing and operating of a railroad, has authority, for the purpose of extending its line, or forming a connection, to acquire, hold and operate a railroad without the State; or, within the State, may extend its road, or may build, construct and operate branch roads from any point or points on its line.” § 1588. “Such purchase, extension, or construction of such branch roads, must be made by resolution of the board of directors, which must be submitted to a board of stockholders called for the purpose of its consideration; . . . and at such meeting must be approved by a vote of a majority in value of the stockholders.”

If the demurrer was sustained on the idea that the complaint failed to aver that the construction of the branch road had been ordered first by a resolution of the board of directors, and then by a majority in value of the stockholders, this was an error. That pre-requisite, if omitted, was defensive matter. “Acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter.”—*Bank v. Dandridge*, 12 Wheat. 70, quoted in *Thorington v. Gould*, 59 Ala. 461, 467. See, also, *Ala. G. L. Ins. Co. v. Cen. A. & M. Asso.*, 54 Ala. 73; *Boulevard v. Davis*, 90 Ala. 207; 3 Brick. Dig. 161, §§ 83, 85, 86.

We said above that we do not express any opinion on the naked inquiry, unaffected by statute, whether a railroad

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corporation has authority to construct what may be called a branch road as an incident to its corporate powers. However that question may stand on general principles, our statute copied above has prescribed the terms and conditions of exercising such power in this State. The statute covers the whole ground, and is not simply an enabling statute. It interdicts the exercise of such power, in any other manner than on the terms therein prescribed. Not by positive assertion, but by necessary implication. "When a statute limits a thing to be done in a particular manner, it includes in itself a negative; and the negative is that it shall not be done otherwise. The limitation exists whenever the statute prescribes the particular manner in which the thing must be done."—*Bickley v. Keenan*, 60 Ala. 293, and authorities cited.

The complaint, alike before and after amendment, sets forth *prima facie* a good cause of action, and the demurrer to it ought to have been overruled.

Reversed and remanded.

WALKER, J. concurs in the conclusion reached, but not in all the positions taken.

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Statutory Detinue for Furniture.

1. *Outstanding title, as against prior possession of plaintiff.*—In detinue, or the corresponding statutory action for the recovery of personal property in specie (Code, §§ 2717-20), the plaintiff may recover on proof of prior possession, unless the defendant shows a better outstanding title, and connects himself with it.

2. *Affidavit to plea of outstanding title, and notice to claimant.*—A defendant in detinue, or the corresponding statutory action, not claiming title in himself, may set up an outstanding title in a third person, with which he connects himself, without making affidavit and praying that such person be brought in to defend his claim (Code, § 2611); the statute being intended for his benefit, and his failure to avail himself of it only leaving the relative rights and liabilities of himself and the adverse claimant unaffected by it.

3. *When action lies; as between boarder and landlord.*—An action of detinue lies only against a person who is in the possession of the property at the commencement of the suit; and when it appears that the plaintiff, having married the defendant's daughter, went with his wife to board with her father's family, carrying with them numerous articles of household furniture, some of which were used

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by him and his wife exclusively, while the rest was placed by them in different parts of the house, and used by the family indiscriminately; and further, that on a separation between him and his wife, he quit the house, leaving his wife there with the furniture, in use as before; *held*, (1) that the defendant did not have such possession as would support an action of detinue against him; (2) that if his possession would support the action against him, he might defend on the claim of ownership by the plaintiff's wife.

4. *Assignment of policy of insurance, or interest in insured property.* An assignment indorsed on a policy of insurance of furniture, by the husband to his wife, in these words. "The interest of M. B., as owner of the property covered by this policy, is hereby assigned to Bertha B., subject to the consent of the company," transfers to the wife the ownership of the property insured.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

This action was brought by Moses Behr against M. L. Gerson and B. Gerson, to recover numerous articles of household furniture, particularly described in the complaint; and was commenced on the 6th September, 1890. The defendants pleaded, jointly and severally, (1) *non detinet*; (2) that they were not, at the commencement of the suit, or at any prior time, in possession of any of the property sued for, nor had or exercised any control whatever over it; (3) that plaintiff and his wife (Bertha Behr), some time prior to the commencement of the suit, came to the house of said M. L. Gerson to board, and brought with them the several articles of furniture now sued for, the greater part of which was placed in the room occupied by them, and the residue in other parts of the house; that plaintiff continued to live in the house with his wife until a short time before the commencement of this suit, when he left the house and his wife, who continued to remain there until after the commencement of this suit, and claimed the furniture as her property, and that defendants never had any possession or control of any part of said property, but the same was under the control of said Bertha, and was claimed by her as her property. A fourth plea was afterwards filed, which alleged that the articles sued for were not the property of the plaintiff, but belonged to the said Bertha Behr, who, at the commencement of the suit, and for some time prior thereto, was boarding at said Gerson's house and occupying rooms there; that the greater part of the furniture was in the room occupied by her, and the other portions were in different places about the house, where they had been placed with her consent, and were subject to her control, and that neither of the defendants had otherwise any possession of the articles sued for.

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The plaintiff demurred to the 3d and 4th pleas, assigning as grounds of demurrer to each, (1) that it attempts to set up title to the property in Mrs. Bertha Behr, but does not connect the defendants, or either of them, with her title; (2) that it attempts to set up a title or claim to the property in a third person, and does not pray for notice to that person to come in and defend; and (3) that it sets up a title or claim to the property by a third person, "but is not accompanied by an affidavit of its truth, and no notice is asked to be served on the alleged claimant to come in and defend." The court overruled the demurrers, and issue was joined on all the pleas.

The evidence adduced on the trial showed, in substance, that the plaintiff married the daughter of said M. L. Gerson, and went with his wife to board at her father's house, carrying with them the furniture here sued for, which plaintiff had bought some time previously; that most of the furniture was placed in the room occupied by them, and the other portions in other parts of the house; that plaintiff and his wife afterwards separated, and he quit the house, while his wife remained, and the furniture was used as before; that plaintiff, a few days before the commencement of this suit, made a written demand on defendants for the furniture, to which they replied, "We have nothing in our possession belonging to Moses Behr;" and that plaintiff had taken out a policy of insurance on the furniture before it was carried to Gerson's house, which policy he transferred to his wife by written indorsement dated October 3d, 1888. The indorsement is copied in the opinion, but the policy itself is not set out in the record. It appeared that a bed-lounge, one of the articles sued for, was bought by the plaintiff after the assignment indorsed on the policy. The plaintiff testified "that the property belonged to him, and that he had never given or sold it to his wife." The defendants testified that the property was left in M. L. Gerson's house, under the circumstances above stated; that neither of them claimed any part of it, but they had used the articles which were not in Mrs. Behr's room, with her consent, she claiming to own all of it.

The plaintiff asked the court to instruct the jury, (1) that the written indorsement on the policy of insurance did not convey to Mrs. Bertha Behr the legal title to the property insured, but was only an assignment of the policy itself; (2) that the policy "did not cover the china and cutlery," and therefore they did not pass by the assignment. The court refused each of these charges, and the plaintiff ex-
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cepted; and he also excepted to a charge given on request of the defendants, "that the jury, if they believed the evidence, must find for the defendants, for all articles sued for except the lounge."

The rulings on the pleadings, the charge given, and the refusal of the charges asked, are assigned as error.

LOMAX & TYSON, for appellant.

TOMPKINS & TROY, *contra*.

COLEMAN, J.—The demurrer to the pleas raises two propositions: 1st, that a defendant in an action of detinue can not set up the title of a third person to defeat a recovery in detinue, without connecting himself with it; and, 2d, that if the defendant undertakes to set up a title in a third person, he must make affidavit, and pray that notice to such person be issued, to come in and defend. Where the plaintiff can not show an actual prior possession, he must show a legal title, to authorize a recovery in detinue; but prior possession is sufficient, unless the defendant shows a better outstanding title with which he connects himself.—*Jones v. Anderson*, 76 Ala. 427; *Huddleston v. Huey*, 73 Ala. 215; *Jackson v. Rutherford*, 73 Ala. 155; *Hall v. Chapman*, 35 Ala. 559.

The second proposition involved in the demurrer to the pleas is not sustained by section 2611 of the Code, cited in support of it. This section, which provides that a defendant, when sued in detinue, may make affidavit that the property sued for is claimed by a third person, and pray for an order that such person come in to defend, was never intended to defeat the common-law right of a defendant to set up an outstanding superior title to plaintiff's, with which he connects himself. If the defendant fails to avail himself of the benefit provided for him in section 2611, his liability to his bailor, or as the case may be, remains as it was without the statute.—*Powell v. Ledyard*, 76 Ala. 423.

The demurrer goes to the whole of pleas 3 and 4. An examination of these pleas shows that they set up a state of facts which, if true, furnish a complete defense to the action, without reference to the defense of an outstanding title in a third person. The pleas distinctly aver that the defendants were not in possession of, and exercised no control over the property sued for, at the time of the commencement of the suit. This is the same defense set up in plea No. 2, upon which issue was joined. No other objection

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than that specifically pointed out by the demurrer can be considered by the court.—*Eads v. Murphy*, 52 Ala. 524; *Ib.* 107; *Sledge v. Swift*, 53 Ala. 110; Code, § 2690. That detinue can be maintained only against a defendant in possession, is abundantly supported by authority—*Graham v. Myers*, 74 Ala. 434; *Lightfoot v. Jordan*, 63 Ala. 224; *Henderson v. Felts*, 58 Ala. 590; *Miller v. Hampton*, 37 Ala. 342.

It was not controverted that plaintiff at one time owned the property. The evidence shows that plaintiff and his wife, who was a daughter of the defendant, M. L. Gerson, carried the property with them to defendant's house; that they boarded for a time with the defendants, using such of the property themselves in their own room as they saw proper for their own comfort, and a part of it was placed in different parts of the house for the use and convenience of themselves and the family generally, except the blankets, and crockery and cutlery. The crockery and cutlery seem to have been stored away in a china-closet, and neither these nor the blankets were ever in use by the defendants. The defendants' evidence was to the effect that they set up no claim to the property, nor exercised any control of it, nor held possession of it further than as shown by the following facts: that plaintiff and his wife carried the property with them to the house of defendant, and placed it in the house where and as they saw proper; that the wife of the plaintiff claimed it, and controlled it as her property, and that it was so recognized by the defendants. Such was the condition, disposition and possession of the property at the time the plaintiff left his wife at defendants' dwelling, and when the suit was begun for the recovery of the property. The plaintiff does not testify that defendant had possession, further than may be inferred from the statement "that he left the property at the house of M. L. Gerson, and that it was in use at the house of said M. L. Gerson, and that he left his wife there." We hold the law to be, that when a boarder carries property with him to a boarding-house, and it is recognized wholly to be the property of the boarder, and subject to his control only, and no claim of right or possession is set up to it by the proprietor of the dwelling, such a possession by him is not that possession which will sustain a suit against him in detinue. We are clear that, if the possession is sufficient for this purpose, the proprietor may show an outstanding title in the boarder's wife superior to the plaintiff's, if he can; and this relation of the parties is sufficient to authorize the defendant to connect his possession with the outstanding title.

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The title of the wife in the present suit grows out of the legal construction of a written assignment made by the husband, the plaintiff, to the wife, on an insurance policy. It reads as follows: "The interest of M. Behr, as owner of the property covered by this policy, is hereby assigned to Bertha Behr, subject to the consent of the Commercial Union Assurance Company, limited, of London. Oct. 3d, 1888." (Signed) "M. Behr." The consent of the company to the assignment was proven. It is contended by plaintiff that these words only assigned the interest of plaintiff in the policy itself, but that the title and ownership of the goods remained in him. We can not consent to such a construction. The words used by the assignor do not admit of such a meaning. The "interest of M. Behr, as owner of the property," is assigned. Such a construction as that contended for requires the imputation to the parties of an attempt to do an act against public policy; that is, that one may own the property itself, and another, without owning any insurable interest in the property, may own the policy of insurance. Looking at the words of assignment as they are, disconnected from all other proof, we hold that the ownership of the property passed by the written assignment. *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320; *Brown v. Com. Fire Ins. Co.*, 86 Ala. 189; *Helmetag v. Miller*, 76 Ala. 186.

The rulings of the trial court are in accordance with the principles above declared as applicable to this case.

Affirmed.

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Bill in Equity for Divorce and Alimony.

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1. *Legislative act granting divorce; constitutionality of.*—Under constitutional provisions now of force, unlike those formerly existing, there is no express limitation of the power of the General Assembly to grant a divorce by legislative act; but the provision which declares that "no special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by a general law, or where the relief sought can be given by any court of this State" (Art. iv, § 23), applies to proceedings for divorce, which are regulated by the general statutes, and renders void any legislative act granting a divorce to a particular person, whether on any of the grounds specified in the statutes, or any other ground whatever.

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2. *Abandonment of wife, as ground of divorce.*—If a husband drives his wife from his house, refusing to let her return for two years or more, she is entitled to a divorce on the ground of abandonment (Code, § 2322, although his act was provoked by exhibitions of ill-temper on her part, the use of coarse and indelicate language, grossly offensive behavior, or other misconduct not constituting a ground of divorce in his favor.

3. *Alimony to wife; aggravating conduct on her part.*—When a divorce is granted to the wife on the ground of abandonment, she is entitled to an allowance for alimony although her own misconduct caused her husband to put her away; but, in making the allowance, "regard being had to all the circumstances of the case" (Code, § 2333), the court will reduce it on account of such misconduct on her part.

APPEAL from the Chancery Court of Fayette.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 14th April, 1890, by Mrs. Josephine E. Jones, against her husband, or late husband, W. W. Jones, and sought a divorce on the ground of abandonment, and alimony. The parties were married in December, 1881, and lived together as man and wife, according to the allegations of the bill, until April, 1887, when the defendant drove his wife from his house. During the session of the General Assembly of 1888-89, the defendant procured the passage of a private statute, entitled "An act for the relief of William W. Jones," which was approved Feb. 18th, 1889, and in these words: "*Be it enacted*," &c., "that William W. Jones, of Fayette county, be, and he is hereby, released from the bonds of matrimony now existing between him and his wife, Josephine E. Jones; which divorce shall have the same effect as a divorce granted by a court of chancery, and the said Jones is permitted hereby to contract matrimony again; *provided*, that the provisions of this act shall not affect in any manner the rights of the said Josephine E. Jones in the courts of this State in the recovery of alimony in any proceedings in any court of this State for a divorce from the said William W. Jones."—Sess. Acts 1888-9, p. 390. The complainant, in her original bill, set out this statute, and recognized its validity, but claimed a divorce and alimony under the terms of the proviso. The defendant, by demurrer to the bill, assailed the validity of the proviso, and denied that the complainant was entitled to alimony after a divorce had been granted to him; and in his answer he stated the facts which, as he claimed, caused him to procure the passage of said legislative act, and further claimed that these facts deprived the complainant of the right to alimony. The chancellor overruled the demurrer to the bill, and held said legislative act unconstitutional and void; and on final hearing on pleadings and proof, he granted

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a divorce to the complainant, with leave to either party to marry again. He also held that the complainant was entitled to alimony, and allowed her \$220 as alimony from the time of the abandonment, \$25 per month as permanent alimony, and \$300 as solicitors' fees. Each part of this decree is assigned as error.

MC GUIRE & COLLIER, JOHN B. SANFORD, and TOMPKINS & TROY, for appellant.—(1.) The power to grant divorces pertains to the legislative department of the Government, and has been exercised by the States generally when not expressly taken away by constitutional provisions.—5 Amer. Eng. Encyc. Law, 746-7; 1 Bish. Marriage & Divorce, §§ 660-86; *Strader v. Graham*, 10 How. U. S. 82, 93; *Green v. State*, 58 Ala. 190; *State v. Gibson*, 36 Ind. 389; *Sewall v. Sewall*, 122 Mass. 156; *Hopkins v. Hopkins*, 3 Mass. 158; *Hunt v. Hunt*, 72 N. Y. 217; *Lamar v. State*, 3 Heisk. Tenn. 287; *Frazer v. State*, 3 Texas, 263; *Cook v. Cook*, 56 S. C. 195; Cooley on Const. Limitations, 132-3; *Starr v. Pease*, 8 Conn. 541; *Wright v. Wright*, 56 Amer. Dec. 223; *Crane v. McGinnis*, 19 Ib. 237. (2.) The Constitution now of force, unlike former ones, contains no express provision limiting the legislative power in the matter of divorces, and the omission is suggestive of an intention to leave the General Assembly untrammelled in the exercise of its sovereign power, leaving each case to be determined, in the legislative discretion, on its own peculiar facts and circumstances; and the courts will not interfere with the exercise of this discretion, recognizing the right of the law-making department of the Government to construe constitutional provisions in matters left to its discretion. An examination of the Session Acts shows that, at each session of the General Assembly, similar legislative acts have been passed, and the disastrous consequences which would result from a judicial declaration of their invalidity is addressed to the serious consideration of the court. (3.) The legislative act is not violative of the constitutional provision relative to special relief laws, "in cases which are or can be provided for by a general law, or where the relief sought can be given by any court." The act itself does not show the reasons for its passage, or the facts on which the General Assembly acted; and the courts can indulge in no presumptions or conjectures against the validity of its action. If the facts shown by the evidence in this case were the facts which induced the passage of the legislative act, it is evident that no cause of divorce existed under the general

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statutes; and the question was presented to the General Assembly, whether it would amend the general statutes to meet such cases, or leave each case to be determined on its own peculiar facts, within legislative discretion. Whether a general statute would have reached this particular case, is at least doubtful; and the General Assembly may have purposely reserved to itself the right to pass on each similar case as it might arise, while declining, on grounds of public policy, to add to the causes of divorce specified in the general statutes. (4.) Assuming the validity of the legislative act of divorce, the complainant was without any standing in a court of equity. If a divorce was thereby granted to her husband, the marriage relation between them was severed and ended, and all rights acquired under it, or dependent on it, ceased: she could not sue for either divorce or alimony.—5 Amer. & Eng. Encyc. Law, 746, note; *Boykin v. Rains*, 28 Ala. 343; *Barber v. Root*, 10 Mass. 262; 15 N. J. Eq. 149; 36 Iowa, 319; *Murray v. Murray*, 84 Ala. 366; *Kamp v. Kamp*, 59 N. Y. 212; *Cummins v. Cummins*, 38 How. Pr. 200. (5.) The misconduct of the wife, as alleged and proved, though it might not be a sufficient ground of divorce, was matter for consideration in the determination of her claim to alimony; and the allowance made to her, it is submitted, was excessive and unreasonable.

ARNOLD & EVANS, *contra*.—(1.) The subject of divorce is regulated by the general statutes, which specify the grounds on which a divorce may be granted, the mode of proceeding, &c. These provisions take the subject out of the legislative domain, and relegate it to the courts. The maxim applies, *Expressio unius est exclusio alterius*. If the defendant had legal ground for a divorce, the courts were open to him; if he had none, the legislative doors were shut against him, as well as the doors of the court. The frequency of divorces by legislative act, under former constitutional provisions, is admitted; and this may have been one of the reasons why, on grounds of public policy, the whole subject was transferred to the courts. Incompatibility of temper, personal abuse, conduct calculated to disturb domestic tranquillity, are recognized grounds of divorce in other States, but are not known in Alabama; and when they are recognized here, it must be by general statutory provisions. (2.) If the legislative act of divorce is valid, the complainant's rights are saved by the proviso.—Cooley's Const. Limitations, 178-80; *Stein v. Leeper*, 78 Ala. 522; *Ramagnano v. Crook*, 85 Ala. 229. (2.) The right to alimony is not matter of Vol. 95.

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discretion.—*Edwards v. Edwards*, 80 Ala. 98; *Jeter v. Jeter*, 36 Ala. 403; *Ex parte King*, 27 Ala. 338; *Lovett v. Lovett*, 11 Ala. 763. The sums fixed by the chancellor were reasonable.—*King v. King*, 28 Ala. 315; *Lovett v. Lovett*, 11 Ala. 770; *Jeter v. Jeter*, 36 Ala. 391.

WALKER, J.—This is a suit by the wife against her husband for a divorce from the bonds of matrimony, and for alimony. It is contended for the appellant that all claim to such relief was barred by the act of the General Assembly of Alabama releasing him from the bonds of matrimony theretofore existing between him and the appellee.—Acts of Ala. 1888 89, p. 361. If that act was valid, no divorce could be decreed in this case, as the bonds of matrimony had already been dissolved when the bill was filed. The proviso in the act only covered a contingency which the enactment itself rendered impossible; for, if the act operated to divorce the parties, the wife could not thereafter maintain any proceedings for a divorce from her former husband, and the proviso does not purport to save her rights to alimony, except in proceedings by her for a divorce. If the act had "the same effect as a divorce granted by a court of chancery," an end was thereby put to the relation of marriage, and, as a consequence, so far as the husband was concerned, the divorce having been granted in his favor, all duties and obligations necessarily dependent upon the continuance of that relation immediately ceased.—*Harrison v. Harrison*, 20 Ala. 449; *Boykin v. Rains*, 28 Ala. 343.

Before the power of granting divorces from the bonds of matrimony was confided to the courts in England, Parliament assumed and exercised the right of passing special acts dissolving the bonds of marriage. Many of the State legislatures in this country have passed special acts of divorce, the validity of which has been sustained when not rendered invalid by the operation of constitutional prohibitions. The courts have generally recognized the right of the State legislatures, when not restrained by the constitutional limitations, to exercise the same power over the subject as was possessed by the English Parliament. And the enactment of general laws conferring upon the courts also authority to grant divorces in certain enumerated cases has not usually been regarded as having the effect of abridging the plenary power of the legislature to dissolve the bonds of matrimony by special acts, either in the same or in other classes of cases.—1 Bishop on Marriage and Divorce, 6th ed., §§ 660 to 695; Cooley on Constitutional Limitations, 6th ed.,

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128 to 132; 5 Amer. & Eng. Encyc. of Law, 747; *Maynard v. Hill*, 125 U. S. 190; *Starr v. Pease*, 8 Conn. 541; *Wright v. Wright*, 2 Md. 429.

The power to grant divorces by special acts is somewhat anomalous as a legislative function. It has been conceded, rather because it had been too long assumed and acted on to be denied, than because on principle it could be regarded as properly within the legitimate sphere of legislative action. Kent says: "The question of divorce involves investigations which are properly of a judicial nature, and the jurisdiction over divorces ought to be confined exclusively to the judicial tribunals, under limitations to be prescribed by law."—2 Kent's Con. 106. Cooley says: "But it is safe to say, that the general sentiment in the legal profession is against the rightfulness of special legislative divorces; and it is believed that, if the question could originally have been considered by the courts, unembarrassed by any considerations of long acquiescence, and of the serious consequences which must result from affirming their unlawfulness, after so many had been granted and new relations formed, it is highly probable that these enactments would have been held to be usurpations of judicial authority, and we should have been spared the necessity for the special constitutional provisions which have since been introduced."—Cooley on Con. Lim., 6th ed., 132.

In each of the former Constitutions of this State there was a provision prohibiting the granting of divorces except in cases provided for by law, by suit in chancery. The Constitution of 1819 further provided, that "no decree for such divorce shall have effect, until the same shall be sanctioned by two thirds of both houses of the General Assembly." Constitution of 1819, Art. VI, § 13. The corresponding section of the Constitution of 1861 was in these words: "Divorces from the bonds of matrimony shall not be granted, but in cases provided for by law, by suit in chancery. But decrees for divorce shall be final, unless appealed from within three months from the date of the enrollment thereof." Constitution of 1861, Art. VI, § 13. The substance of this provision was carried forward into the Constitutions of 1865 and 1868 respectively. — Constitution of 1865, Art. IV, § 30; Constitution of 1868, Art. IV, § 30. The existence of these express constitutional restraints may be regarded as implying a recognition of the power of the legislature to grant divorces in special cases, unless the exercise of such power is prohibited by the Constitution.

The present Constitution of the State contains no express
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provision on the subject of divorce. It, however, prescribes general restraints upon the power of the legislature which were not found in the former Constitutions. The question to be considered is, whether the omission of a special provision against granting divorces except in judicial proceedings left the legislature free to exercise an original plenary power over the subject, and to grant divorces by enactments for special cases. It is clear that such special legislation for individual cases is not in harmony with the policy of preserving an equality of all persons before the law, without favors to some and discriminations against others under similar circumstances. The subjects of marriage and divorce are regulated by the general laws of the State, statutory and common. These general laws fixed the rights, duties and obligations of the parties to the marriage relation. They also provide for the dissolution of that relation in certain contingencies, and prescribe the causes which authorize such dissolution, the kind and measure of relief to be granted, and the mode of proceeding to secure it. If a husband or a wife, who is not entitled under the general law to be relieved of the duties and obligations of the marriage relation, may be freed therefrom by a special act of the legislature for his or her relief, the result is to dispense with the general law for the benefit of an individual. Even if the circumstances are such that the same relief could be assured by proceedings under the general law, the granting of the relief by a special act of the legislature is equally an exemption from the operation of a general law, as the necessity of having recourse to the remedies which others in similar circumstances must pursue is dispensed with. Such legislation singles out an individual for special indulgence, and exempts him from obedience to the general rules which others must conform to. Several provisions of the present Constitution of the State indicate a purpose to confine the legislature, as far as practicable, to the enactment of general laws applicable alike to all persons under similar circumstances. It is made the duty of the General Assembly to "pass general laws, under which local and private interests shall be provided for and protected."—Constitution of Ala., Art. IV, § 25. It is also provided, that "no special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by a general law, or where the relief sought can be given by any court of this State; nor shall the operation of any general law be suspended by the General Assembly for the benefit of any individual, corporation, or association."—*Ib.* Art. IV.

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§ 23. The legislature owes equal obedience to each of the clauses of this section of the Constitution; but such obedience can not be effectually enforced by the courts in the one case as in the other. There is a marked difference between the two clauses. This court has held that, under the first clause, a discretion is necessarily left to the legislature to determine whether the particular object or want "can be provided for by a general law;" and that the exercise of such discretion can not be revised by the courts.—*Clarke v. Jack*, 60 Ala. 271. No such construction can be put upon the language of the second clause of the section. That is a positive, unconditional limitation of the power of the General Assembly. It can not suspend the operation of any general law, for the benefit of any individual, corporation or association. Within the range of this prohibition there is no room for the exercise of any discretion by the legislature, or by the courts. It is not necessary for the purposes of this case to define the scope of this provision. Clearly, it has the effect of leaving the legislature without the power to pass a special act relieving an individual of any liability or obligation which a general law imposes upon him in favor of another, or exempting him from the operation of the remedies afforded by the general law for the enforcement of such liability or obligation, or giving him a right or remedy against another to which he is not entitled under the general law. We need not decide whether this provision would render invalid an act merely conferring upon an individual, corporation or association a privilege involving no interference with the rights of others under the general law, or removing disabilities, or granting such relief as could not operate as an infringement of any rights or remedies to which others are entitled under the general law.—*McKenzie v. Gorman*, 68 Ala. 442. It is sufficient for the purposes of this case to hold that the provision is effectual to render invalid a special act of the legislature for the relief of an individual, which would necessarily operate to absolve him from the duties and obligations which the general law imposes upon him as a husband, to suspend in his favor the general law which others, similarly situated, must conform to in order to obtain relief from the bonds of matrimony. The special act relied on by the appellant was unconstitutional, and presents no obstacle to the relief sought by the appellee, if she is entitled to relief under the general law.—*Darling v. Rogers*, 7 Kan. 592; *Simonds v. Simonds*, 103 Mass. 572.

More than two years before the bill was filed, the appel-
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lant required the appellee to leave his house. They have not lived together since. The husband has not provided for the wife's support, and has not consented to her return to his house. These facts are not disputed. They show a "voluntary abandonment" of the wife by the husband, within the meaning of sub-division 3 of section 2322 of the Code. A husband may as effectually abandon his wife by putting her away from him and denying her the privilege of dwelling with him, as by going off himself from their former residence, leaving her there, and not permitting her to live with him.—*Morris v. Morris*, 20 Ala. 168; *Hanberry v. Hanberry*, 29 Ala. 719; *Kinsey v. Kinsey*, 37 Ala. 393; 2 Am. & Eng. Encyc. of Law, 803. It is not contended that the husband is entitled to a divorce from the wife on any of the grounds prescribed by the statute. Nothing short of the existence of a ground of divorce in favor of the husband against the wife can defeat the right of the wife to a divorce from her husband because of his abandonment of her without her consent, for the period and in the manner fixed by the statute. The proof against the wife in this case, if believed, shows no more than that she was guilty of grossly offensive behavior in her husband's presence on one occasion; that at times she used coarse and indelicate language; that once when her husband's young daughter by a former marriage was standing near the fire-place, she stirred up the fire, so that the flame caught the clothing of the child, and she gave no assistance in the rescue; and that she wrote and circulated a number of anonymous letters cruelly and foully slandering another of her husband's daughters. If she was guilty of such exhibitions of ill-temper and a mean disposition, it may be readily understood how the marriage relation became irksome to the husband. However hard it may have been for him to endure such conduct, yet it did not, under the statute, afford him ground for relief from an uncongenial association, or furnish him with a legal justification for his abandonment of his wife.—*Bryan v. Bryan*, 34 Ala. 516; *Hanberry v. Hanberry*, *supra*; 5 Am. & Eng. Encyc. of Law, 805.

When a divorce is granted in favor of the wife, if she has no separate estate, or if it is insufficient for her maintenance, she is entitled to an allowance out of the estate of her husband; and, in such case, "the allowance must be as liberal as the estate of the husband will permit, regard being had to the condition of his family, and to all the circumstances of the case."—Code, §§ 2332 and 2333. The conduct of the wife before her husband's abandonment of her is a circum-

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stance to be considered in determining the amount of the provision to be decreed in her favor. Her mere failure to contribute to the peace and happiness of the home can not be allowed to justify the husband in casting her off. But she can not be regarded as entirely blameless, if, while she was living with her husband, without provocation from him, she was inconsiderate or disrespectful in her bearing toward him, or was unkind in her treatment of his children by a former marriage, or if she habitually pursued a course of conduct calculated to vex and harass a reasonably indulgent husband. The inducement of gaining an advantage by a liberal provision for her separate maintenance is to be withheld from a perverse wife, who, though guilty of nothing amounting to a ground of divorce against her, yet, without previous fault on the part of her husband, so bears herself in her relations with him and his household, as to provoke him into wishing to get rid of her society. Over-indulgence is not to be shown to a wife who has been abandoned by her husband, when her own failure to act the part of a dutiful wife has helped to put her in the position of "having the law on her side" in a proceeding against the husband for divorce. Such misconduct on the part of the wife may be considered as, in a measure, palliating the offense of the husband, and as abridging her claim to an allowance from his estate for her separate maintenance. *Jeter v. Jeter*, 36 Ala. 391; *Lovett v. Lovett*, 11 Ala. 763. The complainant herself testified: "Dr. Jones was a kind husband to me, one of the kindest in the world." The evidence shows, without contradiction, that he was a man of excellent character, enjoying the respect of the community in which he has lived for many years. There is nothing to indicate that he was at fault in his relations with his wife, until he required her to leave his house. It is unnecessary to detail the evidence as to the misconduct of the wife. Some of the more serious charges against her are not satisfactorily established. Enough, however, is proved to show that she was principally responsible for the unhappy state of feeling in her husband's household. Her conduct was well calculated to foment discord. To say the least of it, she was far from discreet or forbearing in her treatment of her husband's children by a former marriage. Her course towards her husband, and toward those who were naturally the objects of his affection and solicitude, was well calculated to destroy his regard for her, and to overtax his forbearance. True, it was the duty of the husband to persevere in his efforts to prevent an estrangement between himself and his wife, and

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to avoid, even at the expense of his own comfort and peace of mind, an open breach of the marriage relation. He should not have yielded to the impulse to abandon his wife, as she had committed no offense to justify him in that course. But the wife's own folly in acting so as to forfeit the regard of a kind husband is not to be overlooked in determining the provision to be made in her favor.

The evidence indicates that the husband owns property, including his interest in a stock of goods, worth about six thousand dollars in excess of his liabilities. He is engaged in business as a country merchant, and is also a practicing physician, though he has been trying to give up his practice, and gets but little income from that source. Three of his children by a former marriage, two daughters and one son, are living with him and are dependent upon him for their support. They are all minors. His home is in a small hamlet in Fayette county. The habits of life are simple and inexpensive. The price of board in respectable families in that neighborhood is from five to seven and one half dollars per month, with everything furnished. Boarders have been received in the defendant's family at such prices. The complainant has no property which yields her any income. She is entitled to have provision made for her maintenance in the condition in life of her husband. The amount is not to be swelled because she chooses to reside in one of the suburbs of the city of Birmingham, where the cost of living is greater. In view of the course pursued by the wife before the separation, and of all the circumstances of the case, our conclusion is that she should receive fifteen dollars per month as a provision for her maintenance after the divorce. If she had been wholly without fault, a more liberal allowance would have been proper. This is less than was allowed by the chancellor. In this respect his decree will be here modified. The appellant has nothing to complain of in the amounts he was required to pay for compensation to the solicitors for the appellee and for temporary alimony. With the modification above ordered the decree will be affirmed.

Modified and affirmed.

[Young v. Louisville & Nashville R. R. Co.]

Young v. Louisville & Nashville Railroad Co.

Attachment and Garnishment.

1. *Claim of exemption against garnishment; record of another suit as evidence.*—When two garnishment suits are pending against the same defendant and the same garnishee, but in favor of different plaintiffs, the court will not look to the record of one case on the trial of the other, except as it is offered in evidence; and if it appears that the debtor filed a claim of exemption in the second case, and that it was not contested, the plaintiff in that case can not complain that the court ordered the older judgment to be first satisfied, and awarded him only the admitted balance remaining in the hands of the garnishee.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

This action was brought by Randolph Young against Joseph D. Hubbard, and was commenced by attachment sued out on the 5th February, 1891. At that time the defendant was in the employment of the Louisville & Nashville Railroad Company, and the plaintiff sued out a garnishment against that company as his debtor. On the 4th May, 1891, before answer filed by the garnishee, the defendant filed a claim of exemption, stating that the balance due him by the railroad company "amounted to about —, and is not over \$250;" and on the 21st July, he filed another claim of exemption, stating that the amount then due to him by the railroad company was "about \$150." On the 27th July, 1891, the plaintiff's attorney made and filed an affidavit contesting this claim. On the 23d October, 1891, an answer was filed by the garnishee, by its agent duly authorized, denying any indebtedness, but stating that, on the 28th March, 1891, after the service of the garnishment, it had paid over to said Hubbard the sum of \$232.50, on which a garnishment had been served on it at the suit of Craft & Co., said payment being made after the garnishee had been discharged on its answer. An oral answer was afterwards made, on demand of the plaintiff, in which the garnishee admitted an indebtedness of \$96.70, "for the month of October, 1891," On the 23d of October, 1891, the plaintiff recovered a judgment against Hubbard for \$106.27. The trial of the garnishment case was had on the 2d November, 1891, and some

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of the proceedings had in the case of *Craft & Co.* against the garnishee were read in evidence. They appear in full in the report of that case.—93 Ala. 22. The plaintiff asked the court to render judgment against the garnishee, in favor of *Craft & Co.*, for \$125, the amount held on the appeal in that case to be subject to their garnishment, and which the garnishee had paid over to the defendant pending the appeal. The court refused to do this, and rendered judgment in favor of *Craft & Co.* for \$82.21, of the \$96.70 in the hands of the garnishee, and in favor of the plaintiff in this suit for \$13.79, the balance of said sum. The plaintiff excepted to each of these rulings, and he here assigns them as error.

The papers are set out in the transcript indiscriminately, without regard to date or order of filing, and some of the dates stated may not be correct.

W. E. RICHARDSON, for appellant.

E. P. MORRISSETT, *contra*.

STONE, C. J.—In the case of *Craft v. Louisville & Nashville Railroad Co.*, 93 Ala. 22, it was made to appear that—between the filing of the original answer in garnishment—August, 1890—and the second answer filed in the Circuit Court—November, 3, 1890—the railroad (garnishee) became indebted to Hubbard, defendant in attachment, in the sum of one hundred and twenty-five dollars. This sum, we ascertained, had not been covered by any claim of exemption found in that record. We consequently held that the City Court had erred in discharging the garnishee on its answer. The summons of garnishment in that case was served in August, 1890.

In the present case, the garnishment was served in March, 1891; and the garnishee answered in November, 1891. There was a claim of exemption in this case also, which appears to be correct in form. It was not contested. The City Court reached the conclusion that the railroad company owed Hubbard \$96.70, which was not included in the claim of exemptions, but out of this sum the amount of *Craft's* garnishment, being older, must be first paid. That left only \$13.79 to be applied to *Young's* judgment in this case.

True, between the date of *Craft's* garnishment, August, 1890, and the service in this case, March, 1891, the railroad company had been indebted to Hubbard in a considerable sum; but, according to the garnishee's uncontested answer,

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that indebtedness, before the summons in this case was served, had been paid, less an admitted balance. It is somewhat difficult to determine precisely what that admitted balance was, but whatever it may have been, Hubbard, in an affidavit which is in proper form, claimed it as exempt; and that claim was not contested.

We must decide this case, not on the record in the *Craft* case, but on the record we have in hand. Part of the record in that case is embodied in, and made part of the one before us, and to that extent we will consider it. So regarding it, we are unable to find any evidence on which to enlarge the judgment against the garnishee. The \$96.70, ascertained by the City Court to be subject to the garnishments, is the outside limit the present record allows us to go. Of that sum, all but \$13.79 was adjudged, and properly adjudged, to *Craft*, the prior attaching creditor. The real trouble in this case is in finding authority for rendering any judgment against the railroad company, at the suit of *Young*, the present plaintiff.

Affirmed.

95 456
108 528

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Trover and Trespass for Removal of Partition Fence.

1. *Partition fences; repair or removal by either party.*—A fence erected on the line between two co-terminous proprietors, or recognized by them as being on the line, though not so in fact, is a partition fence, and belongs to them as tenants in common (Code, § 1370); either may repair it, and may lawfully enter on the land of the other for that purpose; but, if he destroys it, or removes it on his own land, he is liable in trover at the suit of the other tenant, and also in trespass if he entered on the land of the other in making the removal.

2. *Same; who may maintain trover or trespass.*—If the plaintiff's land was rented out at the time the fence was removed by the defendant, he can not maintain either trover or trespass, which lies only in favor of one who has either the actual possession or the immediate right of possession; but, if only the cleared land was rented out, while the fence which was removed extended through the wood-land beyond, he has a right of action for the latter part.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. JOHN B. TALLY.

This action was brought by Mrs. Sarah C. Garrett against M. N. Sewell, to recover damages for the removal of a par-
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tition fence, and was commenced on the 15th February, 1886. The court charged the jury, on request, to find for the defendant if they believed the evidence, and refused a similar charge asked by the plaintiff; and these rulings, with others, are assigned as error.

J. L. BURNETT, for appellant, cited Code, §§ 942, 1370; *Shipman v. Baxter*, 21 Ala. 456; *Blackburn v. Baker*, 7 Por., 284; *Henry v. Jones*, 28 Ala. 385; *McGhee v. Peterson*, 57 Ala. 334; *Brown v. Cockerell*, 33 Ala. 38; 1 Chitty's Plead. 212, 263; 6 Wait's Act. & Def. 81; 2 Waterman on Trespass, 388; *Symonds v. Harris*, 51 Maine, 14.

MATTHEWS & WHITESIDE, and C. DANIEL, *contra*, cited *Boswell v. Carlisle*, 70 Ala. 244; *Morris v. Robinson*, 80 Ala. 291; *Dunlap v. Steele*, 80 Ala. 291; 6 Wait's A. & D. 76; 2 Waterman on Trespass, 362, 392-3, 948-9.

CLOPTON, J.—Appellant brings the suit to recover damages for the removal of the fence dividing her land from that of defendant. The complaint contained three counts: The first in trover, for the conversion of the rails; the second substantially alleges that defendant wrongfully and maliciously removed a fence inclosing in part the plantation of plaintiff, which was a partition fence between plaintiff and defendant, and had been agreed upon and recognized as such by plaintiff and defendant, and those under whom he claims, for more than ten years, and that its removal left the plantation of plaintiff exposed to depredation by stock; and the third, in terms, claims damages "for a trespass committed by the defendant," and makes, substantially, the same averments as the second, except that the words *wrongfully* and *maliciously*, and the averment as to exposure to stock, are omitted.

The following facts are uncontroverted: In 1858, or 1859, it was agreed between J. R. Lowe, who owned the land on the west side, and W. M. Randle, who owned the land on the east side of the fence, that it should be recognized as the line between them, and as a partition fence. After occupying the land on the east side for about ten years, Randle sold it to Savage, and Savage to Lowe, so that Lowe became the owner of the land on both sides of the fence. On a division of his real estate between his heirs, in 1873, or '74, after the death of Lowe, the land on the west side was allotted to plaintiff, and that on the east side to Mrs. Aubrey, each of whom entered into possession, treating and

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recognizing the fence as the dividing line, and as a partition fence. In 1879, Mrs. Aubrey sold the land allotted to her to defendant, who moved the fence in 1885, about six feet on to his land. The evidence clearly shows that the fence was treated and recognized as on the line, and a partition fence, for ten years before Lowe purchased from Savage—the respective owners claiming to the fence—and that no complaint was made that the fence was not on the line until claimed by defendant in the latter part of 1884, or early in 1885.

Partition fences, as defined by statute, are fences erected on the line between lands owned by different owners. Code, § 1375. Whether it is on the true line, according to survey, or on a line agreed on by the parties, is immaterial. In *Henry v. Jones*, 28 Ala. 385, it was held, "If a part of the fence was entirely on the land of one of the proprietors, still, if it was recognized as a partition fence by both parties, it would confer the same rights as if it were in fact so. The recognition would operate as an estoppel *en pais*, and neither could complain of any act done by the other which would have been lawful had the fence been on the division line." Though a survey may demonstrate that the fence is not on the true dividing line, neither party loses any rights to the same. Section 942 of the Code provides: "When a re-survey of land is made by a county surveyor, for the purpose of straightening section lines, or any subdivision lines of sections, the owners of fences built on the original lines shall not lose their rights to the same, when the re-survey changes the original lines, and places the fence on the land of others." Under the provision of section 1370 of the Code, to the effect that partition fences between improved lands are to be erected and repaired at the joint expense of the occupants, which has been the law since the act of 1807, such fences become the joint property of the adjoining proprietors.—*Walker v. Watrous*, 8 Ala. 493.

Whenever one tenant in common does an unlawful act, whereby his co-tenant is injured, the law affords an appropriate remedy; he may bring trover or trespass against his co-tenant, when the thing in common is destroyed, or the conversion is equivalent to an exclusion of the right of the tenant suing.—*Allen v. Harper*, 26 Ala. 686. The removal of the fence from the original dividing line, on the land of the defendant, and its appropriation to his exclusive use, was tantamount to the destruction of the thing in common. *Symonds v. Harris*, 51 Me. 14; 2 Waterman on Trespass, § 947. Either owner may lawfully enter upon the land of

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the other for the purpose of repairing a partition fence ; but, if the entry is made for the purpose of destroying the fence, such entry constitutes a trespass.—*Henry v. Jones, supra.*

But defendant contends that, notwithstanding the evidence may clearly show the facts as above stated, under the complaint—the first count being in trover, and the others in trespass—the affirmative charge in favor of defendant was rightfully given. The contention is based on the ground, that in order to maintain trover, or trespass, plaintiff must have possession, or the right of immediate possession, at the time of the injury complained of. The *gist* of the action of trespass being the injury to the possession, plaintiff can not recover on his general property, if, at the time of the injury, the right of present possession and enjoyment has been conferred on another. So, also, to maintain trover, the plaintiff must have either possession or the right of immediate possession. The affirmative charge in favor of defendant assumes that plaintiff had neither. While there is evidence that a tenant of plaintiff was in possession at the time of the removal of the fence, there is also evidence tending to show that only the *cleared* land had been rented, with permission to the tenant to get fire-wood off the woodland, which was inclosed by the fence. On this state of the evidence, the court could not assume, as matter of law, that plaintiff neither had possession, nor the right of immediate possession to the wood-land. On the contrary, if the uncontradicted evidence be believed, plaintiff is entitled to a verdict under the first count, and under the others, if it be shown that in order to remove the fence defendant entered on the land of plaintiff.

No question arises as to the measure of recovery.

Reversed and remanded.

DeLoach Mills Manufacturing Co. v. Middlebrooks.

Action by Agent, for Commissions on Sales.

1. *Relevancy of evidence as to sales by other agents.*—When plaintiff sues for commissions on sales of machinery made or effected by him as agent for defendants, they can not be allowed to prove they had other agents in the county who were authorized to make sales for them.

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2. *Impeaching witness.*—A witness can not be impeached by evidence contradicting his testimony as to an immaterial inquiry.

APPEAL from the Circuit Court of Conecuh.
Tried before the Hon. JOHN P. HUBBARD.

STALLWORTH & BURNETT, for appellant.

FARNHAM & CRUM, *contra*.

MCCLELLAN, J.—This action is by Middlebrooks, for commissions on sales which he alleges were made or “worked up” by him, for the defendant company as its agent. There is no conflict in the evidence as to the agency, or the terms of it. Plaintiff was authorized to make sales of machinery, &c. for defendant, and was to receive fifteen per cent. commissions on all sales made by him, and also on all sales which resulted from his efforts—were “worked up” by him—though not in fact consummated by or through him. The only material controversy as to the facts was in respect of the inquiry whether the sales upon which commissions were claimed had been made, or “worked up” by the plaintiff. And in this connection the defendant corporation sought to prove that it had other agents for the sale of its wares in Conecuh county, where plaintiff resided and did business. The court, we think, properly excluded this proposed evidence from the jury. It was irrelevant to the issue. To have admitted it would have been to allow the jury to find that plaintiff had not made or “worked up” the alleged sales, from the mere fact that they might have been made by another agent, without any proof that they were so made, and notwithstanding, even though it had been further shown that they were actually made by another agent, yet they might have been “worked up” by the plaintiff in such sort as to entitle him to the commissions he claimed.

Nor can the admissibility of this testimony be rested on the theory, that it went to impeach plaintiff as a witness. Whether or not he had testified that defendant had no other agent in that territory, he could not be impeached by evidence contradicting him in that respect, because neither his rights, nor defendant's liability, depended upon that fact; it was an immaterial inquiry, which could not be gone into for the purposes of impeachment.—*Griel v. Solomon*, 82 Ala. 85.

The only objection urged to that part of the court's Vol. 85,

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general charge to which an exception was reserved is, that "it assumed facts of which there was no evidence." The objection is untenable. It predicates only these facts: that there was a contract on the part of defendant to pay plaintiff fifteen per cent. commissions on all sales made or "worked up" by him, and this is uncontroverted; that plaintiff "worked up" the sale to Deer, and this plaintiff's evidence tends to establish; and that a sale was made to Deer, which is undisputed.

Charge one requested for defendant is faulty, in that it assumes that plaintiff had failed to prove a material fact in his case, having reference, we suppose, to plaintiff's connection with the sale to Deer, since that fact only was in dispute. There was evidence tending to show that plaintiff's efforts had brought about this sale, and its sufficiency was for the jury. It was not for the court to assume, but for the jury to determine, whether it had or had not been proved.

Charge two requested for the defendant was well refused on the ground of its being abstract, if upon no other ground. Its assumption that defendant became liable to pay, or had paid, commissions on these sales to some third person, in consequence of plaintiff's negligent delay in giving notice of his claim, is entirely gratuitous; there is no such evidence in the record.

The judgment of the Circuit Court is affirmed.

Hood v. Pioneer Mining & Manufacturing Co.

Action for Damages against Employer, by Administrator of Deceased Employee.

1. *Presumption in favor of judgment.*—When a case is submitted to the decision of the court without a jury, and the bill of exceptions does not purport to set out all the evidence which was adduced, the appellate court will presume, if necessary, that the judgment was justified by other evidence which is not set out.

2. *Exception to judgment, or conclusion of court on evidence.*—Under a statute which gives either party the right, "by bill of exceptions, to present for review on appeal the conclusions and judgment of the court upon the evidence," the appellate court can not revise the judgment unless a bill of exceptions was reserved.

3. *Variance in description of injuries complained of.*—Where the complaint alleges that the plaintiff's intestate was killed in the discharge

95	461
96	136
95	461
99	221
95	461
101	247
95	461
106	256
95	461
113	617
95	461
119	71
95	461
141	442
142	182

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of his duties as brakeman, "while ascending the side of the car," by coming in contact with a water-tank which had been placed too near the railroad track, and the evidence shows that, when struck by the tank, he was standing on the platform between two cars, with his back towards the tank, the variance is fatal.

4. *Dying declarations* are not admissible as evidence in a civil action for damages against the employer, by the administrator of a deceased employe.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. JAMES B. HEAD.

This action was brought by the administrator of Joseph J. George, deceased, who was killed while in the discharge of his duties as brakeman on the railroad of the defendant corporation; and was founded on the statute.—Code, § 2590. The case was submitted to the decision of the court without a jury, but no exception was reserved to the judgment or conclusion of the court on the evidence, though several exceptions were reserved to its rulings in excluding evidence. These exceptions related to several portions of the testimony of absent witnesses, on a showing made for a continuance, which was admitted subject to legal objections, and consisted (1) of the testimony of a witness as to the position of the intestate when he was struck by the water-tank, and (2) of the dying declarations of the intestate on the same subject. These rulings, and the judgment of the court on the evidence, are assigned as error.

MARTIN & McEACHIN, for appellant.

WEBB & TILLMAN, *contra*.

COLEMAN, J.—The judgment, in our opinion, must be affirmed for several seasons. The bill of exceptions does not purport to set out all the evidence. It was declared in *Griggs v. State*, 58 Ala. 425, that "where certain evidence is set out in the bill of exceptions, but it is not expressly stated that it is all the evidence, the appellate court can not hold that the bill of exceptions contains all the evidence." We have uniformly held to the rule, that unless the bill of exceptions showed that all, or substantially all of the evidence, was set out, this court would presume, in order to sustain the ruling of the lower court, there was other sufficient evidence before the court, not stated in the bill of exceptions.

The act to regulate the practice and proceedings in civil cases in the Circuit Court of Jefferson county, and in the Supreme Court on appeal from judgments rendered in said

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cases (Acts 1888-9, p. 797, § 7), provides, that "either party may, by bill of exceptions, also present on appeal, for review, the conclusions and judgment of the court upon the evidence," &c. The record fails to disclose that there was any exception reserved to the conclusion and judgment of the court upon the evidence. Not having reserved an exception to the judgment of the court, this court, by the terms of the statute, is without authority to review the correctness of the conclusion and judgment of the court on appeal.

There are exceptions reserved to the action of the court in excluding certain evidence offered by plaintiff. The complaint distinctly avers that plaintiff's intestate, "while ascending the side of the car, came in violent contact with a tank which had been erected too near the railroad track to permit the body of the decedent to pass between the same and the side of the car." There is but one count in the complaint, and this count distinctly avers the cause of action, and clearly states what decedent was doing and how the injury came to be inflicted. The evidence offered, if admissible, tended to prove that decedent was standing on a platform between two cars, with his back toward the tank, and extending out but a little beyond the sides of the cars. This evidence tends to prove a different case from that of which the defendant was informed by the complaint. It was clearly a variance between the averment and proof. Plaintiff did not offer to amend his complaint.—*Prior v. L. & N. R. R. Co.*, 90 Ala. 35; *North Birmingham St. R. R. Co. v. Calderwood*, 89 Ala. 254.

Dying declarations, as such, are inadmissible as evidence in an action of this kind.—1 Greenl. § 156; *Johnson v. State*, 50 Ala. 458.

Under any view we may take of the case as presented in the record, there is no error available to appellant on this appeal.

Affirmed.

Tompkins v. Drennen.

Action for Money Had and Received, by Assignee of Mortgagor against Mortgagee.

1. *Action for surplus proceeds of sale of mortgaged property under power.*—When land is sold under a power contained in a mortgage, and brings more than the amount of the mortgage debt, with interest

96	463
96	202
96	463
123	449

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and lawful charges, the mortgagor or his assignee may recover the proceeds by action for money had and received.

2. *Stipulation in mortgage for payment of attorney's fees, or costs of collecting.*—When a mortgage contains a power of sale, and directs the proceeds to be devoted, first, “to the expense of advertising and selling, and all attorney’s or solicitor’s fees,” while the secured note contains a provision that the mortgagor “shall pay all costs for collecting the above, not less than ten per cent., on failure to pay at maturity;” a sale being made under the power, the mortgagee can retain only a reasonable fee for attorney’s services rendered in connection with the sale.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. JAMES B. HEAD.

Action for money had and received, by D. M. Drennen against Henry B. Tompkins, on facts stated in the opinion. The case was submitted to the decision of the court without a jury, and the judgment for the plaintiff, to which an exception was reserved, is assigned as error.

ROQUEMORE, WHITE & MCKENZIE, for appellant, cited *Chick v. Willetts*, 2 Kans. 384; *Round v. Donnell*, 5 Kans. 54; *Chambers v. Marks*, 93 Ala. 412; 1 Jones on Mortgages, §§ 71, 635; *Montgomery v. Crossthwaite*, 90 Ala. 553; *Harmon Bros. v. Lehman, Durr & Co.*, 89 Ala. 379; *Wood v. Winship Machine Co.*, 83 Ala. 424.

GILLESPIE & SMYER, and WEBB & TILLMAN, *contra*, cited 2 Jones on Mortgages, § 1606; *Munter & Faber v. Linn*, 61 Ala. 492; *Bynum v. Frederick*, 81 Ala. 489; *Camp v. Randall & Co.*, 81 Ala. 281; *Reid v. Catlin*, 49 Wisc. 686; 48 Cal. 369; 6 Allen, 79; 123 Mass. 396; 37 Mo. 534; 87 Ill. 513.

WALKER, J.—The appellant, who was the defendant below, sold certain land in the city of Birmingham under a power of sale in a mortgage, which had been made to secure two promissory notes payable to himself. The principal and interest due on the notes at the date of the sale amounted to \$29,013.31. The mortgaged property was sold for the sum of \$32,000. Out of this sum the defendant retained the amount of the principal and accrued interest on the notes, the amounts of the advertising and auction fees, and also the sum of \$2,901.33 as attorney’s fees. The claim of the plaintiff is based upon his alleged right to the sum retained by the defendant as attorney’s fees.

The uncontroverted evidence shows that, before the advertisement and sale by the defendant under the power in the mortgage, the mortgagors had sold the property covered by Vol. 95.

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the mortgage and all their interest therein to the plaintiff, and had executed a deed to him. The plaintiff, as the grantee of the mortgagors, and as the owner of the equity of redemption in the mortgaged property, is entitled to recover, in an action for money had and received, the surplus of the proceeds of sale remaining in the hands of the mortgagee, after deducting the amounts which, by the terms of the power of sale, were authorized to be applied to the payment of the secured debt and interest thereon, and of such expenses and charges incident to the execution of the power as are provided for therein.—*Webster v. Singley*, 53 Ala. 208; *Cook v. Basley*, 123 Mass. 396; *Buttrick v. Wentworth*, 6 Allen, 79; 2 Jones on Mortgages, § 1940. The question, then, is as to the right of the defendant to the sum retained by him as attorney's fees.

There is one provision in the mortgage itself for the payment of attorney's fees, and another and different provision on the same subject in the notes which were secured by the mortgage. The mortgage confers upon the mortgagee a power sell the property for cash, and to devote the proceeds of the sale "to the paying, first, the expenses of advertising and selling, and all attorney's or solicitor's fees." This is the extent of the provision in the mortgage on the subject. A clause in the following words is found in each of the notes: "It is further agreed that the undersigned shall pay all costs for collecting the above, not more than ten per cent., on failure to pay at maturity." The two provisions are separate and distinct, without any reference in the one to the other. There is an independent field of operation for each of them. A creditor whose demand is evidenced by the debtor's personal obligation, which is secured by a mortgage upon land, has the choice of foreclosing the mortgage upon the breach of the condition thereof, or of proceeding against the debtor without regard to the mortgage security. If either of the two resources should be exhausted without satisfying the demand, resort may be had to the other. Until the demand is satisfied, the creditor may seek at the same time, but by separate and independent proceedings, both the enforcement of the personal liability of the debtor and the foreclosure of the mortgage security. The power of sale in the mortgage affords a means of enforcing the security alone. In making a sale under the power, the creditor avails himself of a special provision for subjecting to the satisfaction of his demand only the property covered by the mortgage. The exercise of the power may involve the expense of attorney's or solicitor's

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fees. In the present case, the payment of such fees out of the proceeds of the sale is authorized by the terms of the power itself. This provision covers only such fees as are incident to the exercise of the power, and does not cover expenses incurred for fees for the prosecution of an action at law on the notes, or of a bill in chancery for the foreclosure of the mortgage.—*Bedell v. New England Mortgage Security Co.*, 91 Ala. 325; *Lehman v. Comer*, 89 Ala. 579; *Bynum v. Frederick*, 81 Ala. 489. The is nothing, either in the mortgage or in the notes, to show that it was the intention of the parties that the provisions in the notes on the subject of attorney's fees should apply in case of sale under the power; and, as the provision in the mortgage itself fully covers that contingency, and there are other and different contingencies in which the provisions in the notes as to the attorney's fees would be applicable, our conclusion is that those provisions do not cover the case of a sale under the power. The effect of the provision in the mortgage was to authorize the mortgagee to pay, out of the proceeds of the sale, a reasonable compensation for the services of an attorney or solicitor rendered in and about the sale made under the power. The plaintiff conceded that the defendant was entitled to retain the amount of such reasonable compensation. The evidence showed, without conflict, that seven hundred dollars was a reasonable fee, and the defendant was allowed a credit for this amount. The court properly rendered judgment for the balance of the sum which had been retained by the defendant as attorney's fees.

It seems that the result would have been the same, if the provisions in the notes could be regarded as applying to a sale under the power contained in the mortgage. In reference to the same provision in a note this court has said: "Stipulations to pay a given per cent. for the services of attorneys are held to import liability for reasonable compensation for legal services rendered in that behalf, not in excess of the amount limited. We do not think that the stipulation here is for more than this."—*Montgomery v. Crossthwaite*, 90 Ala. 553-575. Similar provisions have been given a like effect in other cases.—*Munter v. Linn*, 61 Ala. 492; *Camp v. Randle*, 81 Ala. 240. Contracts for the payment of attorney's fees are recognized as legitimate, when their operation is to provide for the reimbursement of the creditor who, in consequence of the debtor's default, has been put to the expense of employing an attorney to render services in the enforcement of his demand. Such

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stipulations must become convenient cloaks for usury, whenever they are allowed to serve other purposes than the indemnity of the creditor for the expenses so incurred, and when, under the guise of a fee which the creditor has neither paid nor become liable to pay, he may really secure to himself compensation beyond legal interest for the withholding of the amount due to him. The defendant in this case is a lawyer, and rendered the legal services incident to the sale, except that his partner prepared the advertisement notice. The defendant retained the ten per cent. himself, and it is not shown that any other attorney claims or is entitled to any part of it.

Affirmed.

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Bill in Equity for Reformation or Cancellation of Written Instrument.

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100	573

1. *Reformation of written instrument in equity.*—To authorize the reformation of a written contract on oral evidence, requires very great particularity of averment, and very clear proof.

2. *Refunding bond on dissolution of injunction.*—When a bill seeks to enjoin and stay proceedings on a judgment at law, it is error to dissolve the injunction on the denials of the answer, without requiring the execution of a refunding bond by the defendant (Code, § 3531); but the error will be corrected on appeal, and the decree affirmed as corrected.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed by R. P. Dexter against Aug. Ohlander, and sought an injunction against a judgment at law which the defendant had recovered against the complainant, and the reformation or cancellation of the written instrument on which said judgment was rendered. Said written instrument was dated August 27th, 1887, signed by said Dexter, and in these words: "I have received from Mr. A. Ohlander a relinquishment of his lease with L. Lawall, for consideration of \$150 to be paid him in ten days, and use of the premises until Nov. 1st, 1887, free of rent." The bill claimed and alleged that this instrument was not intended as an obligation to pay money, but only as a receipt for another written instrument of the same date, which was

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signed by Ohlander, and in these words: "In consideration of \$150 to be paid to me within the next ten days, and to allow me to continue the use of the store-house N. W. corner of Dexter avenue and Bainbridge streets, for use of storing furniture, until Nov. 1st next, free of rent, I agree to relinquish and give up all my right and claim to above-mentioned store-house that I have by virtue of a five years lease from M. L. Lawall." Ohlander brought an action at law on the instrument first set out, and, after two trials in the court below, obtained a judgment which was affirmed by this court on appeal.—93 Ala. 441. The bill in this case was filed after the affirmance of that judgment. The chancellor dissolved the injunction on the denials of the answer, and his decree is here assigned as error.

THORINGTON & SMITH, for appellant.

E. P. MORRISSETT, and WATTS & SON, *contra*.

STONE, C. J.—It requires very great particularity of averment, and very clear proof, to authorize the reformation of a written contract.—1 Story's Equity, § 152; *Campbell v. Hatchett*, 55 Ala. 548; *Turner v. Kelly*, 70 Ala. 85.

The answer is a full denial of every averment of the bill which tends to give it equity, and the chancellor did not err in dissolving the injunction. The suit, however, being instituted to enjoin and "stay proceedings on a judgment at law," the decree is imperfect in that it did not order and "require of the defendant a refunding bond," according to the provisions of section 3531 of the Code of 1886. The decretal order of the chancellor is here corrected and amended, so as to require the defendant, Ohlander, to give a refunding bond with two sufficient sureties, in double the amount of the sum enjoined, as a condition precedent to the enforcement of said judgment; the bond to be payable and approved as required by the statute.

Let the costs of this appeal be paid equally by appellant and appellee.

Corrected and affirmed.

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Action on Re-insurance Compact.

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96	569
96	469
97	693
96	469
100	359
101	373

1. *Re-insurance compact; whether building or risk is one or several.* Under a contract or compact of re-insurance, between an Alabama insurance company and a New York company, by which the former agreed to assume a certain portion of the risks taken by the latter, on due notice, and within a limit of \$5,000 on any one building or risk; *held*, that a block of stores in New York city, under the same management, and filled with the same kind of goods, was to be regarded as one building and one risk, although two partition walls divided it into three stores, and each with its contents was covered by a different policy, the evidence also showing that the stores on each floor were connected by openings in the partition walls, through which persons passed and goods were moved, though they were generally closed with iron doors.

2. *Same; custom in New York as to character of building or risk*—A custom existing in New York city, among persons engaged in the insurance business, by which a block of stores under the same management, all filled with the same kind of goods, is regarded as three separate buildings or risks, because separated by two partition walls, with the openings through them fastened by iron doors, which are kept fastened except when opened for the passage of persons or goods, is not binding on an Alabama insurance company, under its compact of re-insurance for a New York company, unless it is chargeable with notice, actual or constructive, of the existence of such custom; and an implication or presumption of notice does not arise from the generality of the custom in New York city, when it is shown that the New York company took risks in several other cities and States, all of which were equally covered by the re-insurance compact.

3. *Same; ratification of risk outside of compact.*—The re-insuring company, the defendant, can not be charged with acquiescence in a risk outside of the compact, or ratification of it, because it failed to object after notice, unless it was notified of all the facts showing that the risk was outside of the compact; and the *onus* is on the plaintiff company to prove that it gave full notice of the facts, as required by its fiduciary position.

4. *Waiver of defense to claim.*—If the defendant company, when first notified of the loss, claimed exemption from liability on a ground depending on the legal construction of the contract, this does not amount to a waiver of a defense afterwards developed by facts not then known, and of which plaintiff ought to have given notice.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

This action was brought by the German-American Insurance Company, a New York corporation, against the Com-

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mercial Fire Insurance Company, an Alabama corporation located in Montgomery, and was founded on a contract, called a "re-insurance compact," by which the defendant agreed and undertook to assume a certain portion of the risks taken by the plaintiff, on the terms therein specified. A jury was waived, and the cause submitted to the decision of the court, under a demand for a special finding of the facts. On the facts found by the court, and stated in the judgment, the court decided that the defendant had paid the full amount for which it was liable, and therefore rendered judgment for it. The plaintiff excepted to this judgment, and here assigns it as error.

WATTS & SON, for appellant, contended (1) that Rossiter's stores were three separate buildings and risks, both on the facts shown by the evidence, and under the custom shown to exist in New York; and (2) that the defendant was bound by that custom. They cited *Wood on Insurance*, 433; 3 *Add. Contracts*, 129; *Watts v. Bailey*, 49 N. Y. 464; *Mooney v. Howard Ins. Co.*, 138 Mass. 375; *Astor v. Union Insurance Co.*, 7 Cow. 202; *Enos v. Sun Insurance Co.*, 67 Cal. 621; *Standard Oil Co. v. Triumph Insurance Co.*, 64 N. Y. 485; *Hancock v. Fishing Ins. Co.*, 3 Sum. 132; *Robinson v. United States*, 13 Wall. 363; 3 *Cliff* 318; 4 *Ib.* 200; 4 *Fed. Rep.* 143; *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506; *Barnard v. Kellogg*, 10 Wall. 383; *Newhall v. Appleton*, 114 New York, 140; 4 *Comst. N. Y.* 326; 14 *Barb.* 383; 12 *Cush.* 416; *Rennick v. Bank*, 11 *Wheat.* 581; *Columbian Ins. Co. v. Catlett*, 12 *Wheat.* 383; *Insurance Co. v. McMillan*, 27 Ala. 77; *Fire Ins. Co. v. Updegraff*, 43 *Penn. St.* 35; 80 N. Y. 108.

TOMPKINS & TROY, *contra*, cited *Queen Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485; *Morgan v. Hardy*, 16 *Neb.* 427; *Carr v. Hibernia Ins. Co.*, 2 *Mo. App.* 466; *Sampson v. Security Ins. Co.*, 133 *Mass.* 49; *Cargill v. Mutual Insurance Co.*, 33 *Minn.* 90; *Blake v. Ex. Mutual Ins. Co.*, 12 *Gray*, 265; *Fair v. Manhattan Ins. Co.*, 112 *Mass.* 32; *Hockstadter v. State*, 73 *Ala.* 24; *Eager v. Atlas Ins. Co.*, 25 *Amer. Dec.* 363; 59 *Ib.* 186; *Railroad Co. v. Kolb*, 75 *Ala.* 396; *Wilkinson v. Williamson*, 76 *Ala.* 103; *Smith v. Rice*, 56 *Ala.* 417; *Herring v. Skaggs*, 73 *Ala.* 417; *Higgins v. Moore*, 34 N. Y. 417; *Walls v. Bailey*, 49 N. Y. 495; *Fuller v. Robinson*, 86 N. Y. 396; *Bradley v. Wheeler*, 44 N. Y. 495; *Paine v. Howells*, 90 N. Y. 660.

MCCLELLAN, J.—This is an action by the German-American Insurance Company against the Commercial Fire Vol. 95.

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Insurance Company, on a contract by which, it is alleged, the defendant re-insured certain risks taken by plaintiff on property in New York City. The property was destroyed by fire, the loss paid by plaintiff, and reimbursement to the *pro-rata* extent of re-insurance is now sought to be enforced from defendant. Trial below was had by agreement without jury, the issues of fact were found for defendant, and judgment went accordingly. This appeal presents for review the conclusions of the city judge on the evidence, and the judgment rendered.

There is no material controversy as to what the facts are. The contracts of re-insurance sued on were made in this way: The Commercial Fire Insurance Company, on May 26, 1887, signed, and mailed to the German-American Insurance Company what is known as a "re-insurance compact," which was duly received and acknowledged by the latter. This compact, with its attached lists and schedules, authorized the German-American company to re-insure itself in the Commercial company, within certain limitations as to classes and amounts of risks, by entries thereon or therein, followed by certain *ad interim* and final reports to the re-insuring company, setting forth the term, amount and class of risk, rate of premium, and location of property insured. Among other risks which the compact, as modified by subsequent correspondence, authorized the German-American company to re-insure in, or "cede" to the Commercial company, were "non-fibre" goods in brick stores or warehouses, in amounts not to exceed five thousand dollars in any one building or risk. Claiming to proceed under this authorization, and within its limitations, the German-American company made and reported entries on the compact aggregating twelve thousand five hundred dollars, on non-fibre goods stored in "Rossiter's Stores," Nos. 1, 2 and 3 severally. The first entry and report was of \$2,000 of re-insurance on goods in "Rossiter's Store No. 2, foot W. 60th St., N. Y. City;" the next of \$3,000, on goods in "Rossiter's Store No. 1, N. Y. City;" third, of \$2,000, on goods in "Rossiter's Store No. 1, N. Y. City;" fourth, of \$3,000, on goods in "Rossiter's Store No. 2, N. Y. City;" and last of \$2,500, on goods in "Rossiter's Store No. 3, N. Y. City." Previous to these entries and reports, plaintiff, for the purpose of inducing defendant to increase its maximum limit on amount of re-insurance on storage stores, had sent the latter a schedule showing the amounts of net risks it carried on a number of such stores in New York City and elsewhere, and among the other items in this

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list is the following, "Rossiter's Stores, ft. 60th St., N. Y. City, \$30,000."

On proof of loss, defendant paid plaintiff about \$5,000. and refused to pay the balance claimed under the re-insurance contracts, amounting to something over \$6,000. on the ground that, as it insisted, "Rossiter's Stores" Nos. 1, 2 and 3 constituted but one building or risk within the meaning of the said re-insurance compact, and, of consequence, plaintiff was without authority to bind defendant beyond the maximum limit of \$5,000 on goods stored in said stores, and its entries and reports as to and of all re-insurance in excess of this limitation were abortive and invalid.

It can not be doubted on the evidence found in this record, consisting of minute descriptions and diagrams of Rossiter's stores Nos. 1, 2 and 3, that they, in the ordinary sense of the term, constituted one building. It appears that the building was five stories in height; that the outer wall was common to each of the stores; that the several floors were respectively on the same level; that while two partition walls divided the building into three rooms, or compartments, on each floor, there were doors about eight feet square in each of these walls between the several compartments, in each of the five stories; that the whole structure was under one management, and devoted to the same uses, the storage of non-fibrous merchandise; and that the partition doors were used for the purposes of the passage of persons and the removal of goods from one store to another or others on each floor. It was also shown that double iron shutters were provided for closing these apertures in the partition walls; that these were generally closed, and that the partition walls extended five feet above the roof. It is not seriously, and can not be successfully contended, that, upon this showing, the three stores in question were distinct buildings, or that they did not constitute one and the same building, as that word is commonly understood.—*Fair v. Manhattan Ins. Co. et al.*, 112 Mass. 320; *Blake v. Exchange Mutual Ins. Co.*, 12 Gray, 265; *Cortill v. Millers' & Manufacturers' Mutual Ins. Co.*, 33 Minn. 90; *Sampson v. Security Ins. Co.*, 133 Mass. 49; *Carr v. Hibernia Ins. Co.*, 2 Mo. App. 466; *Hochstadter v. State*, 73 Ala. 24.

It is equally manifest, we think, that these stores, or the goods stored therein, constituted but one risk in the sense of the compact under consideration, unless the word is to take on a different significance from the usage and custom proved in this case, and to be presently considered. It is most clear from the record before us that the Commercial
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company conceived it to be of the utmost importance to it that its exposure to loss under the re-insurance compact should in no case exceed \$5,000. When the German-American company advised and requested it to raise its maximum list from \$2,500 to \$7,500 or \$10,000 on non-fibre storage, it replied, "We think that the line suggested by you is rather too large for us; we have, however, concluded to authorize an increase on the 'non-fibre' stores to \$5,000, that on 'fibre' to remain \$2,500 as heretofore." And the purpose of the company evidently was to guard against the possibility, or probability in case of any loss, of losing in any one fire more than it could afford to lose, having in view its relatively small capitalization and assets. The means adopted to effectuate this purpose was the stipulation of the compact against being bound beyond a stated sum on any one building or risk. How this means could accomplish the end to which it was addressed, if the stipulation be construed so as to admit of re-insurance to three times the minimum limit upon the mere circumstance that there are three rooms, stores or compartments in the building proposed to be insured, while the probable consequence of a fire in any one of these stores would be the destruction of the contents of all three of them, and where the risks arising from possibility of misconduct on the part of the insured would, of course, be equally incident to the goods in all and each one of the stores, it is difficult to perceive. With the probability that a fire starting in either of the stores would consume the contents of the others, and the certainty that incendiarism by the owner for the purpose of collecting insurance money—a risk which must be reckoned in all fire insurance—would go to the destruction of all the property kept by him in the building, there is every reason for the conclusion that the Commercial Fire Insurance Company intended the limitation to \$5,000 to obtain with respect to property stored in different compartments, rooms or stores in the same building, as in the case at bar. And we accordingly hold, that plaintiff was without authority to re-insure itself in the defendant corporation, on merchandise stored in "Rositer's Stores," in any sum beyond \$5,000, if the re-insurance compact is to be interpreted according to the ordinary significance of the term "building or risk"

It is proved in this case, however, that according to an established and universal usage or custom of the business of insurance in the city of New York, each one of "Rossiter's Stores," numbered 1, 2 and 3, was a distinct building for all the purposes of insurance, and that risks taken upon goods

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in them severally are distinct and separate risks. So that, if this usage is to obtain in respect of the compact of re-insurance involved here, as claimed for plaintiff, the several contracts of re-insurance entered and reported to the defendant, being each within the latter's maximum list when measured separately as to each store, are within the limitation of \$5,000 stipulated for, and therefore valid and binding on the Commercial company. While it is well settled at this day, that the existence of an usage in respect of the subject-matter of a contract may have the effect of giving to its terms definitions which would not otherwise attach to them, the doctrine rests, except in particular instances, solely upon the theory, that the parties in entering into the compact had such usage in mind, stipulated with reference to it, and, hence, made it a part of their contract; and whether an usage, in a given case, is thus to be taken as a part of the contract, whether the parties had it in view in their negotiations, and intended that their agreement should be read and construed with reference to and in the light of such usage, is always a question of fact. And as, in the nature of things, no man can be said to have contracted with reference to a fact—to have had a fact in mind—of which he was ignorant, usage relied on by one party to give color to the obligations of another, or to impose a liability which does not arise on the ordinary meaning of the terms of their contract, must be shown to have been known to such other party. This is usually done by proof of an established usage, certain, uniform and reasonable in character, and of such general acceptance, and consequent notoriety, as that *prima facie* presumption of knowledge of it on the part of him who is sought to be affected by it arises, and, un rebutted, affords the predicate for the further presumption, of a conclusive nature, that he considered it in the particular dealing to which it is incident, and made it as much a part of his contract as if it had therein been specifically referred to.

In the case at bar, the *onus* was on plaintiff to prove, not only that the usage relied on had been established and existed at the time of the contract, but also that the defendant had knowledge of it, and therefore is to be holden to have contracted with reference to it. There is no direct evidence of such knowledge. The inference of knowledge is sought to be rested alone on proof of the establishment, existence and prevalence of the usage in the city of New York. Had both contracting parties been domiciled in that city, and entered into a re-insurance compact solely with reference to

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risks located there, there would be some ground to say that defendant would be held *prima facie* to a knowledge of the usage. But the domicile of defendant was in Alabama, and the re-insurance compact contemplated and provided for the taking of risks not only in the city of New York, but throughout the country. Not only so, but the correspondence between the parties demonstrates that risks were actually incurred under the compact in a number of other towns and cities. It can not be supposed that the Commercial company had knowledge of the local usages incident to the business of insurance in each of these numerous localities, and so contracted with reference to them that its obligations, expressed in clear and unambiguous terms, imported a liability for one sum on a given state of facts, in New York city, another sum on the same facts in Brooklyn, another in Litchfield, Connecticut, yet another in Chicago, and so on *ad infinitum*. The law to the contrary is well settled, that proof of such local usages will not raise up a presumption of a knowledge of their existence on the part of one engaged generally in the business to which they pertain in a certain city, at least where the domicile of the party sought to be charged is elsewhere; or, in other words, that in order to create even a *prima facie* presumption that a party has knowledge of an usage incident to a particular business about which he is engaged, the usage must be shown to be a general one in that business, in such sort as that it would be unreasonable to suppose he was ignorant of it. This plaintiff has failed to do; no general usage is proved, or attempted to be proved, and the defendant can not be held beyond the terms of its compact dissociated from any effect the alleged usage is claimed to have upon those terms. *Cobb v. Limerock Ins. Co.*, 58 Me. 326; *Lawson, Usages & Customs*, §§ 17, 25, 26, 27; *Hill v. Hibernia Ins. Co.*, 10 Hun, 26; *E. Tenn., V. & G. R. R. Co. v. Johnston*, 75 Ala. 596; *Smith v. Rice*, 56 Ala. 417; *Herring v. Skaggs*, 73 Ala. 446; *Bradley v. Wheeler*, 44 N. Y. 495; *Child v. Sun Mutual Ins. Co.*, 3 Sandf. 26; *Walls v. Bailey*, 49 N. Y. 464; *Higgins v. Moore*, 34 N. Y. 417.

The presumption of knowledge of an established usage, which arises upon proof of its generality in the business or trade to which it is incident, is, as we have indicated, generally speaking only *prima facie*, and hence rebuttable by direct evidence of a want of such knowledge.—*Walls v. Bailey, supra*. With reference to contracts of insurance, there is this objection to the doctrine just stated: that insurance companies are under such a duty to inform themselves of

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the usages of the particular business insured as that they will not be heard to deny such knowledge. This only means, however, that where a *general* usage in business is proved, an usage of the character that raises up the *prima facie* presumption of knowledge in ordinary cases, the insurer, in view of the duty resting on him to acquaint himself with the general usages of the business, will not be let in to rebut the presumption, which, in consequence, becomes a conclusive one as to him. But an insurer is no more bound than any other party by proof of usages obtaining to a greater or less extent, territorially or otherwise, in respect of the business insured, which are not *general* in their nature, but obtain only in certain localities, or not substantially to all instances of the particular business. So that, if it were conceded here that had the proof established the New York City usage in question as incident to the insurance business throughout the territory contemplated in this re-insurance compact, the defendant would not be heard to assert its ignorance of it, or to deny that it contracted with reference to it; yet the predicate for this *quasi*-estoppel is wholly lacking, in that the proof adduced is not of such general usage, but only of one that is local and peculiar to the City of New York—a particular usage or custom the existence of which raises no presumption at all that defendant had knowledge of it.—Lawson's Usages & Customs, §§ 17, 19, 26.

It is further contended for plaintiff, that conceding the re-insurance compact did not authorize more than \$5,000 of insurance on "Rossiter's Stores," yet the defendant acquiesced in, and thereby ratified plaintiff's entries involving a risk of \$12,500, and thus validated these entries. Of course, this contention must be rested on the assumption that defendant was advised of the location and character of Rossiter's three stores, and knew or must be held to have known that they in fact constituted but one building; since acquiescence, from which ratification may be inferred, can only be predicated of a failure to disaffirm a transaction after the party is advised or put on notice in respect of the facts which entitled him to repudiate it. We do not find from this record that the Commercial Fire Insurance Company had knowledge or notice of the fact that these several stores constituted one and the same building, until after the loss had occurred, and demand had been made on it for its *pro-rata* of the insurance. The relations existing between the two companies were of a fiduciary character. The German-American company was in a sense the agent of the Commercial company, for the purpose of re-insuring itself in

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the latter. The utmost candor and good faith on the part of the former were of the essence of the relations created by the compact. The Commercial company was justified in the assumption that the German-American company, in fixing liabilities on the former to enure to its own benefit, would not abuse the confidence incident to the relation existing between them, but would strictly adhere to and be guided by the terms of the compact, and not exceed the limits of liability thereby imposed. It had a right, therefore, to assume that it would not be entered in a sum greater than \$5,000 on any one building or risk, and to act upon this assumption until it was advised to the contrary. It was not incumbent on the insurer to seize upon pretexts or slight indications to indulge suspicions leading to inquiries as to the good faith of its *quasi-agent*; and it does not lie in the mouth of the German-American company to say, Notwithstanding the trust and confidence inherent in our contractual relations, you should have been on the alert, as if anticipating malversation on our part, to institute minute inquiry into the transactions between us, with a view to discovering that we had violated the instructions you had laid down for our guidance. Conceding, therefore, that the Commercial company must be held to notice that "Rossiter's Stores Nos. 1, 2 and 3" were located at the foot of 60th street, from the casual mention of them as being there situated in the list of July 31, 1888 (which was forwarded to defendant for a purpose entirely distinct from that of giving advice of the location of any one of the numerous buildings mentioned therein), and this notwithstanding there is what seems to be a pregnant omission from the reports of re-insurance of all specification as to the location of two of these stores; yet we do not conceive that, under the circumstances, this notice that these stores were at the foot of a certain street carried either constructive or actual knowledge to defendant that the stores were in and constituted a single building. They might well have been the three stores next the end of the street, and yet have also been distinct buildings; and the defendant, in view of the stipulations of the compact which it had a right to suppose plaintiff would observe, was justified in assuming that they were in fact separate buildings and risks, although it may have known they were all at the foot of 60th street.

On the same considerations, our further conclusion is, that defendant is not prejudiced in this case by the fact that it at first placed its exemption in part from the asserted liability on another ground. This could not have been a

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waiver of the defense now relied on, because the Commercial company, at the time of advancing the other defense, was not advised of the facts on which this one depended, and its ignorance of them was due, not to its own negligence, but to that of the plaintiff.

We find no error in the record, and the judgment of the City Court is affirmed.

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Action on Foreign Judgment.

1. *Plea denying jurisdiction of person, and replication averring subsequent appearance.*—In an action on a foreign judgment, the defendant pleaded that the court which rendered it had no jurisdiction of his person; to which plaintiff replied that, at a subsequent term of the court, defendant appeared, and moved to set aside the judgment on the same ground alleged in his plea, and that the court decided the motion against him; *held*, that the replication was demurrable because it did not aver facts which showed that the court had jurisdiction of the motion to set aside the judgment.

APPEAL from the City Court of Montgomery.
Tried before the Hon. THOS. M. ARRINGTON.

THORINGTON & SMITH, for appellants.

ARRINGTON & GRAHAM, *contra*. (No briefs on file.)

COLEMAN, J.—Appellants brought suit in the City Court of Montgomery against J. C. Haas, upon a judgment recovered against him in a court of general jurisdiction in the city of Philadelphia, State of Pennsylvania. To the complaint the defendant filed his pleas setting up that the court in which the judgment was rendered was without jurisdiction of his person at the time of its rendition. The plaintiff, by his replication to the plea of the want of jurisdiction, showed that, at a subsequent term of the same court, the defendant moved the court to vacate and annul the judgment, the foundation of the present suit, upon the same grounds now set up in the pleas as a defense, and that after notice to the plaintiff in that suit, the question was adjudicated adversely to the motion. The defendant demurred to the replication of the plaintiff, for that the re-

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plication failed to aver that the court had jurisdiction to hear and adjudicate the subject-matter of the motion; and also upon the further ground, that the replication failed to aver that the question was heard and adjudicated upon its merits. The court sustained the demurrer to plaintiff's replication, and the correctness of this ruling is the question for consideration.

In *Buchanan v. Thomason*, 70 Ala. 402, it was declared that the rule is well settled, that a court "is without power to alter, vary or annul final judgments or decrees after the close of the term at which they may have been rendered, unless it be mere clerical errors or omissions." It is equally well settled, that a court at any subsequent term may vacate and annul a judgment or decree which is void upon its face; but, if the invalidity of the judgment is not apparent on the face of the record, and can only be shown by matter extrinsic, or *dehors* the record (except in case one of the parties was dead at the time it was rendered), then the general rule applies, and the court is powerless over final judgments and decrees rendered at a former term.—*Johnson v. Glasscock*, 2 Ala. 522; *Carlisle v. Killebrew*, 89 Ala. 329; *Baker v. Bardclift*, 76 Ala. 417; *Cox v. Jones*, 40 Ala. 297.

If the court had granted the motion, and vacated the judgment, we would presume in favor of the ruling of the court that the record proceedings showed upon their face that the court had no jurisdiction; and the presumption also arises from the refusal of the court to grant the motion, that upon the record proceedings *prima facie* the judgment was not void. It would not follow, however, from these presumptions, that the court had jurisdiction to hear evidence extrinsic of the record, and to determine from this evidence that the court had jurisdiction to determine the facts involved in the motion. In fact, it would require statutory authority to authorize the court to exercise such jurisdiction at a subsequent term.

We understand the foregoing to be a well settled rule at common law, and presumptively is the law in all the States of common-law origin. The reasons are stated forcibly, and with great clearness, in the case of *Pettus v. McClannahan*, 52 Ala. 57. It is also settled, that we must presume in favor of the judgment rendered by a court of general jurisdiction of a sister State that the court had jurisdiction of the subject-matter adjudicated, until the contrary appears. *Slaughter v. Cunningham*, 24 Ala. 269; *Kingman v. Paulson*, 126 Ind. 507; 22 Am. St. Rep. 611. If it be apparent on the face of the record that the court did not have jurisdiction,

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then no such presumption arises.—*Dozier v. Joyce*, 8 Por. 312; 24 Ala., *supra*; 22 Am. St. Rep., *Arthur v. Israel*, 383-7; *Blanton v. Carroll*, 86 Va. 537, 356; *Benefield v. Albert*, 132 Ill. 655; *Henderson v. Banks*, 70 Texas, 398.

It may be that the motion of defendant Haas, entered in the court of Common Pleas of Philadelphia, to vacate and annul the judgment rendered against him at a former term, was a direct attack upon the validity of the judgment; but we are of opinion that, at common law, the jurisdiction of the court to consider the motion was limited to facts apparent upon the face of the record proceedings. If the proceedings showed upon their face that the court which rendered the judgment did not have jurisdiction of the person of the defendant, it was within the power of the court to vacate and annul the judgment. We are furthermore of the opinion, that if the proceedings *prima facie* were correct, and the judgment upon its face regular, so that it required extrinsic evidence, matters *dehors* the record, if such were the real facts, to show that the court did not have jurisdiction of the person of the defendant; then, under the general principle, that a court has no power over its final judgments after the adjournment of the term at which they were rendered (except as herein above limited and qualified), the court did not have jurisdiction, in the absence of a statute, at a subsequent term, to adjudicate the question of fact presented by the motion of defendant to vacate and annul the judgment. The injured party might have redress in some other way.—*Croft v. Dexter*, 8 Ala. 770.

The question is directly presented, does the rule which raises the presumption that courts of general jurisdiction of sister States had jurisdiction over questions and matters adjudicated, prevail in cases where, in order to maintain the jurisdiction exercised, it is necessary to presume that the legislature of the sister State has by statute conferred that jurisdiction, and that the common law in this respect has been altered? or does the rule dominate that the common law is presumed to exist in our sister States, and that it is necessary in such cases to plead specially the statute of a sister State, showing that the common-law rule in this respect has been altered.

Applying the proposition to the case at bar: At common law, the court of Common Pleas did not have jurisdiction, at a subsequent term, to hear extrinsic facts, and determine therefrom the jurisdiction of the court. Was it the duty of defendant to plead negatively that there was no statute con-

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ferring such jurisdiction, and prove his negative plea? or was it the duty of the plaintiff, in his replication to defendant's plea, to aver the statute giving the court jurisdiction? How is the defendant to establish his negative plea, if he pleads it? Must he bring before the court the entire system of legislation of the sister State? In the case of *Gunn v. Howell*, 27 Ala. 663, afterwards reported in 35 Ala. 144, and referring to *Mills v. Stewart*, 12 Ala. 94, it was held that, though garnishment proceedings were purely statutory, this court would presume that a judgment rendered in the courts of a sister State, upon such proceedings, acted within its jurisdictional authority. In the case of *Mills v. Stewart*, *supra*, p. 95, the court uses this language: "If, in point of fact, the tribunal had no jurisdiction either of the subject-matter or of the parties, it was competent for the plaintiff to have replied to it, and put the matter in issue." What would have constituted a sufficient replication in that case, is undecided. In the case of *Gunn v. Howell*, 27 Ala., the plea did aver generally that the court had jurisdiction, but it did not set out the statute conferring jurisdiction in such cases. The point was made, that the general averment, being a mere conclusion, was insufficient, and that the statute should have been specifically pleaded. The court seemed to consider it unnecessary to set out the statute in the plea, holding that in pleading it was not necessary to set out affirmatively the facts upon which the power and authority of the court to act depend; but the rule was declared, that if the record introduced in evidence failed to show the facts which gave the court jurisdiction, or failed to show that the court determined for itself the jurisdictional fact, then the basis on which the right to the special remedy rests is wanting, and the whole proceeding void.

In that case, the record of garnishment proceedings introduced in evidence failed to show a jurisdictional fact; and this court held, that the judgment rendered by the court in Georgia was invalid for the want of jurisdiction, and that defendant's plea was not sustained. The case was retried, and is reported in 35 Ala. 162, but no new question pertinent to the present issue was decided. It would seem that the practice pursued on the trial of that case, and the conclusion of the court, was barely consistent with the general principle declared in the opinion itself. Why was it necessary for the defendant to introduce in evidence all the proceedings of the suit to judgment in the Georgia court, and also the statutes of Georgia authorizing the institution of garnishment proceedings, in order to sustain the validity of

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the judgment upon which he relied to support his plea, if its regularity and validity must be presumed from the fact of its rendition? If it was incumbent on the defendant to introduce in evidence the statutes of Georgia to support his plea, good pleading would seem to require that he aver them in his plea. If, instead of joining issue upon the plea of the defendant setting up the judgment in garnishment, the plaintiff had replied that there was no statute in Georgia authorizing a judgment in such proceedings, the attitude of the parties, and the condition of the pleadings, would be similar to that in which the defendant in the present case would be placed, if, instead of demurring to the defendant's replication, he had rejoined by averring that there was no statute of Pennsylvania which gave the court jurisdiction to hear the motion at a subsequent term. This would reverse the well-recognized principle and rule which requires that he who claims a right not based upon the common law, but under the law or statute of a foreign State, must set out or substantially state the law or statute under which he claims. We are of opinion plaintiff's replication was defective in not averring jurisdictional facts, and the court did not err in sustaining the defendant's demurrer to plaintiff's replication.

Affirmed.

THORINGTON, J., not sitting.

Smith v. Johnson.

Action by Sheriff, on Bond of Indemnity.

1. *Levy of second attachment on property in hands of sheriff under prior attachment; liability on bond of indemnity.*—In an action by a sheriff on a bond of indemnity, which was given to procure the levy of an attachment on goods which were already in his possession under the levy of prior attachments, if it is shown that the levy was discharged by agreement between the plaintiff and the claimant of the goods, who thereupon released plaintiff from liability on account of the levy, but afterwards recovered a judgment against the sheriff; the defendants may show that that judgment was founded on the levy of the prior attachments, and a recovery can not be had against them, in any event, for more than nominal damages.

APPEAL from the Circuit Court of Jefferson.

Tried before the HON. JAMES B. HEAD.

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HEWITT, WALKER & PORTER, for appellant.

LANE & WHITE, *contra*.

WALKER, J.—The appellee, C. A. Johnson, sued out an attachment against the Rogers Printing Company, and directed the sheriff to levy the writ on certain property as the property of the defendant in attachment. The sheriff required a bond of indemnity, which was made; and he then executed the writ as directed. The property levied on was already in the sheriff's possession when Johnson sued out his attachment, having been seized under writs of attachment which had been sued out by other persons against the same defendant. Nothing whatever was done under Johnson's attachment except to indorse the levy on it. Within a day or two after the levy was made in this way, there having been no change whatever in the possession of the property, Johnson's attorneys, in writing, ordered and directed the sheriff to release and discharge the property from the levy under Johnson's attachment, and notified the sheriff that Allen, who claimed to be the owner of the property levied on, had agreed to relinquish all claim against Johnson because of the levy of his writ, if the property was released from that levy. Thereupon the sheriff released the property from that levy, but retained it under the prior writs sued out by other persons. Afterwards, Allen sued the sheriff in trespass for taking the property upon which the several writs of attachment had been levied, and recovered a judgment against him for more than two thousand dollars. Thereupon the sheriff brought this suit on Johnson's bond of indemnity, to recover the amount of said judgment and costs, which, it is alleged, have been paid.

The complaint in the action of trespass brought by Allen followed the form prescribed by the Code (p. 794, Form 23), and was against the sheriff alone. The writs which the sheriff had levied on the property were not referred to in the pleadings in that case. The sheriff's defense in that case was conducted by the attorneys who represented the parties whose attachments had been levied before Johnson's was sued out. Johnson was not notified of the pendency of that suit, and was not represented in its defense. Of course, Johnson's bond of indemnity covered only the acts of the sheriff for which it was intended to afford him indemnity. The makers of that bond are not to be charged for the faults of the sheriff for which they did not undertake to

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answer. The action of trespass against the sheriff did not show on its face that it was based on the levy of Johnson's process on the property. It was competent for the defendants in this suit to show that the damages recovered against the sheriff in the action of trespass were for a taking of the property other than under Johnson's writ. To this end it was proper to admit evidence to show that, when Johnson's writ was levied, the sheriff already had the property in possession under process which prior to that time had been sued out by other persons; and also to show that the act of the sheriff in taking and retaining the property under the earlier process was proved against him in the action of trespass. The result of this proof is to make it plain that, if Allen was the owner of the property, and entitled to its possession, the trespass by the sheriff had been committed before Johnson's attachment was sued out. The subsequent act of the sheriff in levying Johnson's attachment on the same property, by simply making an indorsement to that effect on the writ, did not render his previous seizure and retention of the property any more or less a trespass. When Allen, as the owner of the property, agreed to waive all claim against Johnson because of his attachment, and thereupon the latter had his levy discharged, the functions of the sheriff as to that writ ceased, without his ever having done anything under it amounting to more than a mere technical offense against Allen's rights as owner. When Allen brought this suit against the sheriff, the substantial grievance he had to complain of was the seizure and retention of the property under the older process. If the makers of Johnson's bond of indemnity had been joined with the sheriff as parties defendant to that suit, they could have pleaded Allen's release, in bar of any recovery against them.

Conceding that the release did not discharge the sheriff's liability because of the levy of Johnson's writ, and conceding also that the levy amounted to a trespass as against Allen, because he, as owner of the property, was then entitled to the immediate possession of it, though the sheriff had the actual possession; yet it is plain that no substantial damages could have been recovered against the sheriff because of that levy. When property is already in the sheriff's possession under former writs, his levy of other process upon it by merely making an indorsement to that effect imports only nominal damages to the owner of the property, if it is not subject to the process, if that levy is

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discharged before anything more is done under it. The owner might show special damage to him by reason of the mere levy. But such special damage would have to be claimed to be recovered. No special damages were claimed in the action of trespass against the sheriff. The circumstances make it plain that the levy of Johnson's writ could have figured in that suit only as the basis of a recovery of nominal damages. We can not escape the conclusion that the substantial damages recovered against the sheriff in that case must have been based upon his seizure and retention of the property under the older process. In the light of the evidence as to what was proved against the sheriff in that case, it can not be doubted that, so far as that judgment was based upon any act of the sheriff for which the bond now sued on was given to indemnify him, it represents only a recovery of nominal damages, which would not even carry costs against him.—Code, § 2838. The complaint in this case charges only the recovery and payment of that judgment as a breach of the condition of the bond sued on. No special damages are claimed. Under the circumstances, the mere recovery of the judgment, without any special damage shown, could at most entitle the sheriff to recover nominal damages in a suit on Johnson's bond of indemnity. Conceding that he was entitled to such a recovery, yet a verdict and judgment for the defendant will not be reversed or set aside, when the plaintiff is entitled to recover only nominal damages, unless the vindication of some substantial right is involved.—*New Orleans, M. & T. R. Co. v. Southern & A. T. Co.*, 53 Ala. 211; 5 Amer. & Eng. Encyc. of Law, 61. On this ground the judgment in this case may be affirmed. The admission that the plaintiff was entitled to recover at all is a mere concession for the purposes of the argument adopted to show that he has nothing substantial to complain of in the judgment against him. It is not decided that a judgment in his favor would have been authorized by the evidence.

Affirmed.

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Eastis v. Montgomery.

Contested Probate of Will.

1. *Declarations of devise and proponent as evidence.*—The declarations of an executor and proponent, one of several beneficiaries under the will propounded for probate, not made in the presence of the testatrix, are not competent evidence for the contestant, whether made before or after the execution of the will.

2. *Undue influence; relevancy of evidence as tending to show.*—As tending to prove undue influence over the testatrix by one of her sons, one of the executors and proponents, who was his mother's general agent in the transaction of her business, the contestant can not be allowed to prove that, on a sale of land by her, the son signed her name to the bond for title.

8. *Evidence as to pecuniary condition of children not provided for by will.*—It being shown on the part of the contestant that affectionate relations existed between the testatrix and certain grandchildren, for whom the will made no provision, the proponents may prove that these children had considerable property of their own.

4. *Burden of proof in case of confidential relations; participation of proponent in preparation of will.*—Where it is shown that the chief executor and proponent of the will was the general agent of the testatrix, his mother, in the transaction of her business, the fact that he carried her to town with him, on her own request, and procured an attorney named by her to write her will, does not show such active participation on his part in the procurement of the will as, coupled with the existence of the confidential relations between them, will cast on him the *onus* of disproving undue influence.

5. *Charge as to influence of fear or imaginary terrors in procuring will.* A charge asked, in these words, "The conduct of one in vigorous health, towards one feeble in body, even though not unsound in mind, may be such as to excite terror or dread, and to make him execute as his will an instrument which, if he had been free from such influence, he would not have executed: imaginary terrors may have been created sufficient to deprive him of his free agency,"—is properly refused.

6. *Charges as to testamentary incapacity, and burden of proof.*—Charges given at the instance of the proponents, instructing the jury, in effect, that testamentary incapacity must exist at the time of the execution of the will; that the burden of proof as to such incapacity is on the contestants, the presumption being in favor of sanity and capacity; and that this burden can only be discharged or shifted by proof of prior habitual or fixed insanity, or actual insanity or other incapacity at the date of the instrument,—are correct expositions of the law.

7. *Charge as to testamentary capacity.*—A charge instructing the jury that, "if the testatrix had mind and memory enough to recollect the property she was about to bequeath, and the persons to whom she wished to bequeath it, and the manner in which she wished it to be disposed of, and to know and understand the business she was engaged in, then, in contemplation of law, she had a sound and dis-

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posing mind, and her great age and bodily infirmities do not vitiate a will thus made,"—asserts a correct legal proposition.

8. *Charge as to undue influence; explanatory charge.*—A charge which instructs the jury that they must find in favor of the contestants, "unless the evidence shows that the will was obtained by moral coercion, or by importunity which could not be resisted by the testatrix," asserts a correct legal proposition; and if the contestant fears it may mislead the jury, because the will was contested on other grounds, he should ask an explanatory charge.

APPEAL from the Probate Court of Jefferson.

Tried before the Hon. A. H. BENNERS, as special judge.

In the matter of the last will and testament of Mrs. Martha Montgomery, deceased, which was propounded for probate by her three sons, Jonathan, Felix and David Montgomery, who were therein named as executors, and was contested by Mrs. A. C. Eastis, a grand-daughter of the testatrix, on these grounds: (1) that the testatrix, at the date of the will, was of unsound mind; (2) that her signature to the instrument was procured by fraud and undue influence; and (3) "that it was not made and executed according to law." The will was dated the 6th September, 1884, was written by Hon. M. T. Porter, then a practicing attorney, and was attested by him and C. L. McMillion; and each of them testified, on behalf of the proponents, to its due execution and attestation, and stated the circumstances under which they were called in for that purpose by Jonathan Montgomery. The proponents then offered the will in evidence, and the court admitted it, against the objection and exception of the contestant; the ground of objection being, "that said will was not shown to have been properly executed." By the terms of the will, the testatrix gave all of her property to her eight living children, bequeathing only \$5.00 each to the children of two deceased daughters, Mrs. Ellard and Mrs. Hawkins. W. W. Ellard, a witness for the contestant, having testified on cross-examination, that Hawkins, at the time of his death in 1873, "had property near Elyton of very considerable value," the contestant moved to exclude this evidence from the jury, and excepted to the overruling of the motion. He was also asked, on cross-examination, "How much property did your children have at the time of the execution of the will? and the court allowed the question, against the objection and exception of the contestant. The witness answered, "that his children owned valuable lands in Jefferson county, and that he owned 220 acres of land, but it was not very valuable."

Said Ellard testified, also, that Jonathan Montgomery attended to all of his mother's business, from 1866 until her

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death in 1889—"that he was in fact the general manager of all her affairs;" also, that he had heard said Jonathan, in 1878-9, "trying to persuade his mother to make him a deed to about 70 acres of her land, which she refused to do at that time, and he abused and cursed her because she would not make the deed." J. W. Weatherly, a witness for the proponents, who had married a daughter of the testatrix, having testified on cross-examination, "My wife received 20 acres of land," was asked this question, "How much of her lands did testatrix divide among her eight children each, the beneficiaries in the will, after the execution of the will which embraced the lands so divided, if any?" The court sustained an objection to this question on the part of the proponents, and the contestant excepted. The bill of exceptions does not show the connection in which this evidence was offered, but only states these facts. Other witnesses testified, in behalf of the contestant, to disrespectful conduct and abusive language used by Jonathan Montgomery towards his mother. One of these witnesses testified: "I heard Jonathan say one day that he was going to see to it that his mother did not give the Ellard children any of her property, and that they should have none of it." The court excluded this evidence, on objection by the proponents, and the contestant excepted. Another witness for the contestant was asked this question: "Did you not hear Jonathan say that he was going to see to it that the Ellard children should have none of his mother's property?" The court sustained an objection to this question, and the contestant excepted.

Mrs. Anderson, a daughter of the testatrix, at whose house the will was executed, was asked this question: "Were you not present, and did you not see Jonathan Montgomery sign your mother's name to the bond for title to W. J. Cameron for the 100 acres of land?" The court sustained an objection to this question, and contestant excepted.

Jonathan Montgomery, one of the proponents, was examined as a witness for them, and denied that he had ever used abusive language to his mother, or treated her in any way with disrespect; and on cross-examination he stated: "Mother deeded to each of us, beneficiaries in the will, 20 acres of her land, and then had 65 acres left. I signed all the deeds for her. I sold off for her, in 1887, 100 acres of land to W. J. Cameron, for \$10,000, of which he paid me in cash \$3,333," and the balance afterwards as stipulated; and that this money was lent by her to her several children. The

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witness was asked this question: "Did you not have a conversation with your sister, Mrs. Jane Hawkins, at her house in this county, in the presence of her daughter Jane, in which you said that your mother had executed a will that you did not like, in which the Ellard children were provided for, and that you had induced her to destroy that will." The court sustained an objection to this question, and the contestant excepted.

The contestant requested the following charges in writing, and duly excepted to their refusal:

(1.) "While the existence of confidential relations between the testator and the beneficiaries is not, in itself, enough to shift the burden of proof upon the proponents to show that there was not an undue influence existing upon the mind of the testatrix at the time of the making of the will, yet the existence of confidential relations between the testator and the principal or large beneficiary under the will, coupled with activity on the part of the latter in and about the preparation and execution of the will, such as the initiation of proceedings for the preparation, employing the draughtsman, selecting the witnesses, excluding persons from the presence of the testator at or about the time of the execution, and the like, will raise up a presumption of undue influence, and cast upon him the burden of showing that it was not induced by *coercion* or fraud on his part, directly or indirectly."

(2.) "If the jury believe from the evidence that Jonathan Montgomery managed and controlled the affairs of the testatrix for many years before the making of the will, and up to that time, living in the family with her and her insane daughter; that he actively participated in and about the execution of the will, such as procuring the draughtsman, the witnesses, &c., then this is sufficient to cast upon the proponents the burden of proving that the will was not the product of undue influence."

(3.) "The jury is charged that, in procuring a will to be made by which the testator disposes of his property in a manner different from what he would have done, had no improper influence been exercised over him, is sufficient reason for setting aside the will."

(4.) "The conduct of one in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror or dread, and to make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of his free agency."

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(5.) "If the jury believe from the evidence that Mrs. Montgomery, from the infirmity of age, or other cause, was reduced to that condition in which she was under the dominion and control of Jonathan Montgomery; and that from threats, over-persuasion, putting in fear or dread, or any other improper conduct on his part, she was induced or influenced to execute this supposed will, contrary to what she otherwise would have done, then the paper is not a will, and their verdict must be for the contestants."

The court gave the following charges at the instance of the proponents, to each of which contestant excepted:

(1.) "The court charges the jury that an influence, to be an undue influence such as will be sufficient to vitiate a will, must be such as in some degree to destroy the free agency of the party making the will, and such as to constrain her to do what is against her will."

(2.) "If the jury believe from the evidence that the will was not obtained by the exercise of an influence amounting to coercion, by a motive tantamount to force or fear, such was not an undue influence."

(5.) "The burden of proof as to insanity, or incapacity to make a will, is on the contestant in the first instance, and that burden remains on the contestant until she shows habitual and fixed insanity, or otherwise shows a testamentary incapacity at the time the will was executed."

(6.) "There is no evidence in this cause of any importunity by Jonathan Montgomery of his mother to induce her to make the will in controversy."

(7.) "There is no evidence in this case of any threats made by Jonathan Montgomery towards his mother to induce or coerce her to make the will in controversy."

(8.) "That unless the evidence shows that the will was obtained by moral coercion, or by importunity which could not be resisted by the testatrix, the jury must find the issue in favor of the proponent."

(9.) "If the jury believe from the evidence that Martha Montgomery, at the time she made the will, was of sound mind, she could make a will; and for her mind to be sound, it is not necessary that her memory be perfect, and her mind be unimpaired; but if she had mind and memory enough to recollect the property she was about to bequeath, and the persons to whom she wished to bequeath it, and the manner in which she wished it to be disposed of, and to know and understand the business she was engaged in, then, in contemplation of law she had a sound, disposing mind; and her great age and bodily infirmity, if she was infirm, and her

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impaired mind, if her mind was impaired, do not vitiate a will thus made."

(10.) "The burden of proof to show undue influence is on the contestants in this case."

(11.) "The court charges the jury that a testatrix may, after the making of a will, sell or convey part of the property included in the will, without affecting the dispositions in the will so far as the remainder of the property mentioned in the will is concerned."

(12.) "Sanity is the normal condition of the human mind, and the testatrix in this case is presumed by the law to have been sane when she made the will, unless the contestant has shown to the jury's satisfaction that she was under the disability of habitual and fixed insanity prior to the execution of the will, or that she was not capable of making a will at the time the will was made."

(13.) "The influence which the law calls undue influence, and which must be shown to vitiate a will upon the ground of undue influence, must be an influence exerted at the time of the execution of the will, or must have such a relation to its execution as that the jury believes from it that the will was executed under such influence."

(14.) "Testamentary incapacity for making a will must be an incapacity existing at the time of the execution of the will."

(15.) "The burden of proof as to testamentary incapacity is on the contestant, and is not shifted except by proof of habitual and fixed insanity on the part of the testatrix prior to the making of the will."

The several rulings on evidence, the charges given, and the refusal of the charges asked, are assigned as error.

McGUIRE & COLLIER, for appellant.

HEWITT, WALKER & PORTER, and E. K. CAMPBELL, *contra*.

MCCLELLAN, J.—Many of the questions presented by this record were before this court on a former appeal, and then determined against the appellants. It was then held that the error of excluding, when first proposed, evidence as to the conveyances by the testatrix, after the making of the will, of seventy acres of land to Jonathan Montgomery, and twenty acres each to said Montgomery and the other principal beneficiaries, was cured by its subsequent admission, the facts in this regard being clearly proved, and indeed not controverted; that the declarations made by

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Jonathan Montgomery, then, and now again, offered in evidence, were not competent either to support or invalidate the will; and that the proposed testimony as to the transaction between Jonathan Montgomery, representing the testatrix, and W. J. Cameron, involving a sale and bond for title of and to one hundred acres of land, was properly excluded. It was also then ruled, that the giving of a charge requested by the proponents, to the effect that there was no evidence in the case of threats made by Jonathan Montgomery towards his mother, to induce or cause her to make the will in controversy, involved no reversible error.—*Eastis v. Montgomery*, 93 Ala. 293. And these several rulings we re-affirm.

This contest is prosecuted by, or in the interest of grandchildren of the testatrix—the issue of two daughters who had died before the will was executed—for whom the instrument makes no substantial provision. One of the two main grounds of contestation is the alleged undue influence exerted by the children of the testatrix, or some of them, who are equal beneficiaries under it. Evidence was adduced going to show affectionate relations between the testatrix and these grandchildren. This was, of course, intended to afford an inference that had the testatrix taken counsel of her affections, and been allowed to make such dispositions of her property as they naturally dictated, the grandchildren would not have been cut off with a penny; and therefore, the argument proceeds, undue influence must have been exerted upon her to induce this unnatural result. It is manifest that the strength of this inference depends greatly upon the circumstances and necessities of the grandchildren. If they, for instance, were already provided for—if their conditions in life were not such as to appeal to the bounty of the testatrix—it was much more reasonable that she should have failed of her own free will to make additional provision for them in her will, than had they been in necessitous circumstances. And for the purpose of showing that this exclusion from any substantial benefits under the will, notwithstanding the affection entertained for them by the testatrix, was not unnatural, and did not afford a basis for any inference of undue influence, it was entirely proper for the proponents to adduce evidence to the effect that the contestants had property of their own.—*Schouler on Wills*, § 242; *Beaubien v. Cicotte*, 12 Mich. 459; *Crocker v. Chase*, (Vt.) 1 East. Rep. 755; *Stubbs v. Houston*, 33 Ala. 555; *Fountain v. Brown*, 38 Ala. 72.

An objection was made to the introduction of the will in Vol. 95.

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evidence, on the ground that it was not shown to have been properly executed. We are not advised by counsel in what respect the preliminary evidence fell short of proving the requisite formality in the execution of the instrument, nor have we been able to find that anything essential in that regard was omitted to be done. The objection was without merit.

Charge No. 1 requested by the contestants was well refused, because, to say the least, it is abstract in a sense, and would have tended to confuse and mislead the jury. Some of its postulates find no lodgment in any tendency of the evidence. There is no evidence in this record of any activity on the part of Jonathan Montgomery in and about the preparation and execution of the will, except such as was the result of the wishes and requests of the testatrix, which, so far as the evidence discloses, were entertained and expressed by her of her own free will, and not themselves induced by any undue influence. Such activity, not of proponent's own motion, or prompted by personal motives, but in behalf of the testatrix, and in furtherance of her purposes, will not combine with confidential relations to shift the burden of proof as to undue influence upon the proponent. And because of this, the charge was misleading; the activity shown by the evidence was not of a character to support the conclusion sought to be drawn from it. Moreover, there is no evidence whatever that the proponent excluded persons from the presence of the testatrix about the time of the execution of the will,—a fact which is made a sub-postulate for the proposition declared in the charge; and to this extent, at least, the instruction was palpably abstract.

Charge No. 2 refused to contestants is open to the same objections as those stated to charge 1. There is no evidence of such procurement of the draughtsman and witnesses, as, with proof of confidential relations, cast the *onus* of negating undue influence on the proponent.

Charge 3 refused to contestants was well calculated to mislead the jury, in that it assumes that the will referred to had been procured to be made by the exercise of improper influence, and might thereby have led the jury to the conclusion that, in the opinion of the court, the will in this case had been so procured. Had this charge directed the jury to the effect that, if they *believed* from all the evidence that Martha Montgomery had been induced by improper or undue influence to execute a will different from the will she would have executed but for such influence, they would be authorized to set it aside, it would have been unobjection-

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able; but, as it is written, it is clearly open to a construction which would have made it an invasion of the province of the jury, the effect being to deny their right to say, in the first instance, whether the will propounded *had been* so procured to be made.

Charge 4 refused to contestants is palpably an argument throughout. Of course, the conduct of one toward another may be such as to excite that degree of dread and terror in the latter as will induce him to execute an instrument purporting to be a will which does not accord with his real wishes and purposes, and is therefore not a will at all; and this regardless of the respective physical and mental conditions of the parties. But it is no part of the court's duty, charged only with the declaring the law to the jury, to enter upon this kind of disquisition as to the probable or possible effect of the conduct of one man toward another. This is a matter of fact and inference for the jury, and one upon which they are deemed as competent to pass as the presiding judge, and one, too, upon which the judge is not, and they are, authorized and required to pass. This charge, moreover, as well as the 5th instruction requested for contestants, is abstract. There is no evidence of the excitation of terror and dread in the mind of the testatrix, nor of any threats, or over-persuasion, or putting in fear on the part of Jonathan Montgomery, in connection with the execution of the will by his mother.

Charges 5, 12, 14, and 15 given at the instance of the proponents, to the effect, or involving the ideas, that testamentary incapacity is an incapacity existing coterminously with the execution of the alleged will; that the burden of proof as to such incapacity is upon the contestants, the original presumption of sanity and capacity being always indulged; and that this burden can only be discharged or shifted by showing prior habitual or fixed insanity, or actual insanity, or other incapacity at the date of the instrument, are correct expositions of the law; as also is charge 9, which defines testamentary capacity.—*Leeper v. Taylor*, 47 Ala. 221; *Cotten v. Ulner*, 45 Ala. 378; *Daniel v. Hill*, 52 Ala. 430; *O'Donnell v. Rodiger*, 76 Ala. 322; *Kramer v. Weinert*, 81 Ala. 414.

The pleadings presented three issues: (1) whether the instrument propounded as a will had been efficiently executed; (2) whether Mrs. Montgomery had testamentary capacity; and (3) whether the will propounded was procured to be made by the exercise of undue influence. Charge 8, "That unless the evidence shows that the will was obtained

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by moral coercion, or by importunity which could not be resisted by the testatrix, the jury must find the issue in favor of the proponents," had reference to the *issue* of undue influence *vel non*. If contestants apprehended that the jury would be misled by this charge to the conclusion that all three of the issues—the whole case—should be determined against the contestants, if they found that no undue influence had been resorted to, they should have asked an explanatory and limiting charge. This tendency or capacity to mislead in charges, while it will justify their refusal, is no ground for reversal when they are given, if they in fact assert the law correctly. And the charge, abstractly considered, is sound.—*Bancroft v. Otis*, 91 Ala. 279; *Eastis v. Montgomery*, 93 Ala. 293.

Every assignment of error which has not been specifically discussed is covered, either by what we have said, or by the opinion of the court on the former appeal; and as the facts of the case as then and now presented, when brought to the touch of the principles of law obtaining in the premises, are substantially the same, we deem it unnecessary to say more here than that we find no error in the record.

Affirmed.

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Contested Probate of Will.

1. *Testamentary papers probated together; revocation by later will.*—A testamentary paper executed by the testatrix five or six years before her death, in execution of a testamentary power conferred on her by her deceased husband, is not revoked, as matter of law, by the execution and destruction of a later will, which is not shown to have revoked it; nor by the execution of a third will, a few months before the death of the testatrix, containing substantially the same provisions, but not referring to it; and the two instruments may be admitted to probate together, as constituting the entire last will and testament of the testatrix.

2. *What is testamentary capacity.*—If the testatrix had mind and memory sufficient to recall and remember the property she was about to bequeath, the objects of her bounty, and the disposition which she wished to make—to know and understand the nature and consequences of the business to be performed, and to discern the simple and obvious relation of its elements to each other—then, in legal contemplation, she had a sound mind and disposing memory.

3. *What is undue influence.*—The undue influence which will avoid

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98	602
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113	504
114	227
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127	37

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a will, must amount to coercion or fraud, destroying the free agency of the testator, and constraining him to do what is against his will: mere persuasion or argument addressed to the judgment or the affections, in which there is no fraud or deceit, does not constitute undue influence.

4. *Relevancy of evidence as to mental condition of testatrix.*—When the probate of a will is contested on the ground of mental incapacity or undue influence, the real issue is as to the condition of the mind, or the operation and effect of the undue influence, at the time the will was executed; but former facts and circumstances, relevant to this issue, are admissible as evidence for either party.

5. *Will making unequal disposition of property.*—The law does not undertake to prescribe or regulate the duties of a testator in the disposition of his property, and the fact that he makes an unequal disposition of it among his next of kin does not impose upon the proponents, or beneficiaries under the will, the *onus* of "giving some reasonable explanation of the unnatural character of the will, or at least showing that it is not the offspring of mental defect, obliquity, or perversion."

6. *Charge as to explanation of "suspicious circumstance."*—A charge requested on the contested probate of a will, instructing the jury that, if the proponents and principal beneficiaries under its provisions had a "controlling agency in procuring its execution, it is universally regarded as a very suspicious circumstance, and requiring the fullest explanation," requires too high a degree of proof, and is properly refused.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

In the matter of the last will and testament of Mrs. Anna O. Knox, deceased, which was propounded for probate by William Knox and Alex. Troy, who were therein named as executors, and was contested by Edward N. Knox, a grandchild, on the grounds of testamentary incapacity, undue influence, and fraud. The testatrix died on the 14th June, 1890, being at the time over eighty years of age. The papers propounded for probate consisted of a will dated September 16th, 1889, and a codicil dated May 2d, 1890, each attested by two witnesses. By the terms of the will, the testatrix bequeathed \$2,000 to the pastor of St. Peter's church in Montgomery, or his successor in office, to be used in saying masses for her family, and in such other manner as in their discretion "they may see proper to use it;" gave \$10,000 to the sisters of Loretto in Montgomery, to be used and invested for the benefit of her great-grand daughter, a granddaughter of William Knox; bequeathed \$250 each to three servants, and bequeathed and devised all the residue of her property to William Knox and Mrs. Myra Semmes. By the terms of the codicil, she changed the bequest for the benefit of her great-granddaughter, directed that she should be educated at a seminary in Georgetown, District of Columbia, that the money should

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be invested and used for her benefit, and, in the event of her death without children, "shall revert to her grandfather, William Knox, and, if he die first, to my heirs equally, after her death without children;" and gave several other small pecuniary legacies.

By an amendment of their petition, the proponents asked probate also of another testamentary paper, executed by the testatrix on the 28th June, 1883, and attested by two witnesses, which purported to be executed in execution of testamentary powers conferred on her by her deceased husband, by deeds therein particularly described, as copied in the opinion of this court; and by which she made the following disposition of the property therein referred to: "Now therefore, in execution of said power, I do hereby, by this my last will, direct that the said one half of said property so held in trust be conveyed to and divided between my daughter Myra and my son William, to be held by their heirs forever. In witness whereof," &c. The contestant objected to the allowance of this amendment when it was offered, and also moved to strike it out on the evidence adduced, on the ground that it was revoked by the testamentary papers afterwards executed by Mrs. Knox; not only the papers propounded for probate, but another will executed by her in 1887, and afterwards destroyed, as to which J. M. Falkner, who wrote it, testified that it "was like the will of 1889, except that it gave \$5,000 to R. H. Knox;" and that it was destroyed in his presence, by William Knox, by the direction of the testatrix, in 1888. The court allowed the amendment to be made, and instructed the jury that, "as matter of law, said testamentary paper was not revoked by the subsequent wills;" to which rulings the contestant excepted. Said Falkner testified, that he wrote the will of 1889 according to the instructions of Mrs. Knox, and was with her for more than an hour; that her mind seemed bright and clear, and he could not see that she was under any undue excitement; and that neither William Knox nor Mrs. Semmes was present when the will was executed, though they were in the house. It was proved that the codicil was written by Mrs. Semmes, and the only subscribing witness who was examined testified that she did not see or hear it read over to Mrs. Knox before signing it. The proponents proved, also, that Mrs. Knox executed another will in 1875, and another in 1879, in neither of which was the contestant's name mentioned. The contestant himself testified, and other witnesses testified in his behalf, that William Knox exercised great control over his mother, and that she was

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afraid of him, especially when he was intoxicated; and that Mrs. Semmes exercised great influence over her mother, particularly during her last illness. The proponents themselves denied the exercise of any undue influence on their part towards their mother, and proved facts and circumstances rebutting it; and there was also evidence by several witnesses as to the mental and physical condition of Mrs. Knox, her habits, partialities, prejudices, &c.; but all this evidence is material only to the questions raised by the charges given and refused.

The court gave the following charges to the jury at the instance of the proponents, to which the contestant duly excepted:

(1.) "As a matter of law, that portion of the will of 1883 propounded for probate was not revoked by the wills said to have been executed by Anna O. Knox in the years 1887, 1889, 1890."

(2.) "Influences of one kind or another surround every rational being, and operate necessarily in determining his course of conduct under every relation of life. Within due and reasonable limits such influences afford no grounds of legal objection to his acts; hence mere passion, or prejudice, the influence of peculiar religious or secular training, of personal associations, of opinions, right or wrong, imbibed in the natural course of one's experience and contact with society, can not be set up as undue, and as sufficient of themselves to defeat a will."

(3.) "The influence which, of itself, will vitiate or defeat a will, must be proved to be undue. Such undue influence is defined as that which compels the testator to do that which is against his will, from fear, the desire of peace, or some feeling which he is unable to resist, and which is tantamount to force or fear."

(4.) "Even undue influence can not of itself defeat or vitiate a will when offered for probate, unless the evidence proves to the satisfaction of the jury the two following points: first, that the influence was in *fact* exercised; and second, that this influence by its exercise was effectual in producing the peculiar will offered for probate."

(5.) "If there was anything peculiar in the temperament or moods of thought of the testatrix, so far as susceptibility is thereby shown, all these present proper considerations for the jury; but, if the jury believe from the evidence that the will here propounded for probate, and mentioned in the issue here joined between the parties, was duly made, signed and published by the testatrix as her last will and testament, Vol. 95.

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in the presence of the subscribing witnesses thereto, and that the provisions of said will were at the time of the execution of the will by her fully understood and approved, and were in accordance with her then choice and intention; and if the jury are not satisfied by the evidence that fraud or undue influence induced the execution of said will, then, upon this state of facts, the jury ought to find the issues in favor of proponents, and against contestant."

(6.) "If the will of Anna O. Knox mentioned in the issues joined in this cause was executed by her in the presence of the subscribing witnesses thereto while she was of sound mind and disposing memory, and capable of making a will, then, before the jury can by their verdict invalidate said will so executed by her, they must be satisfied by the evidence, and by a comparison of the will in all its provisions, and under all the exterior influences which were brought to bear upon its execution, with the testatrix as she then was, that such a will could not well and reasonably be the result of the free and uncontrolled action of such a person so operated upon."

(7.) "The law treats the right of testamentary disposition with great kindness. If questioned, it must be on strong grounds."

(8.) "The law presumes that the testatrix was of sound and disposing mind and memory at the time of making her will, and the burden of proving that she was not of sound and disposing mind and memory at the time of making her will is on the contestant."

(9.) "Undue influence is influence that, operating on the mind of the testatrix, constrains her to do that which is against her will, and in some degree destroyed her free agency, but which, from fear, the desire of peace, or some other cause than affection, she is unable to resist; and unless the jury believe from the evidence that Anna O. Knox was constrained by another to make her will against her own wishes, they should find the issues against the contestant."

(10.) "If the jury believe from the evidence that, at the time of the making of her will, Anna O. Knox had mind and memory enough to recollect the property she wished to bequeath, the persons to whom she wished to bequeath it, and the manner in which she wished to dispose of it, and her will was not procured by fraud or undue influence, she had a right to make such disposition of her property as partiality, pride or caprice might dictate."

(12.) "If the jury should find from the evidence that

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Anna O. Knox was of sound mind, but addicted to the use of drugs or opiates, that would not incapacitate her from making a will while she was not under the influence of them."

(13.) "Stronger proof should be required to raise the presumption of undue influence in the case of a will, than of a deed or contract. The same rule does not apply with equal force to benefactions received under wills and deeds of gift, but there exists a well grounded distinction between the two classes of cases. Stronger proof is, and manifestly should be, required to raise a presumption of undue influence in the case of a will, than of a deed or contract; for the former, unlike the latter, can not take effect until the giver is dead, and therefore in a condition entirely incapacitating his further enjoyment or use of the subject of his testamentary disposition. Improper influence may be often inferred to have operated in producing gifts, when the same evidence would fail to authorize such an inference in case of a legacy or devise."

(15.) "If the jury are satisfied that the testatrix, at the time of the execution of the several papers propounded as her will, was capable of exercising thought and affection—if she knew what she was about, and had memory and judgment, her will can not be invalidated on the ground of insanity; neither can it be set aside on the ground of undue influence, unless such influence amounted to a degree of restraint such as the testatrix was too weak to resist, such as deprived her of her own free agency, and prevented her from doing as she pleased with her property; neither advice nor argument nor persuasion will vitiate a will made freely, and from conviction, though such will might not have been made but for such advice and persuasion."

(16.) "Undue influence, to vitiate a will, must have been actually exercised to produce the particular will, and this must be operative at the very time of the execution of the particular paper in controversy as a will; and the burden of proving that such influence was undue, and was operative at the time of the execution of the paper, and caused its execution contrary to the free and independent wishes of the person making the will, is on the contestant, and not on the proponent."

(17.) "And the jury must be satisfied by a comparison of the will in all its provisions, and under all the exterior influences which were brought to bear upon its execution with the maker of it as she then was, that such a will could not be the result of the free and uncontrolled action of such a

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person so acted upon, before they can by their verdict invalidate it."

(18.) "To set aside a will of a person of sound mind for having been obtained by undue influence, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis, and the undue influence exercised in relation to the will itself, not an influence in relation to other matters or transactions."

(20.) "The fact that a will executed with due solemnity by a competent person, containing clauses and provisions in favor of the person or persons alleged to have exercised undue influence, if *sufficient* [suffered] to remain unrevoked for any considerable time after the alleged causes have ceased to operate, or before they commenced to operate, is evidence that it was freely executed, and that it gave expression to the settled wish of the testatrix respecting her property and her affections towards the donees."

(21.) "The execution of a number of wills running through a number of years by a testator, in which a particular relation is not mentioned as a beneficiary, is evidence that it was the settled purpose of such testator to exclude such person from her testamentary bounty."

The contestant asked the following charges in writing, and duly excepted to their refusal:

(X.) "Where a will is unreasonable in its provisions, and inconsistent with the duties of the testator or testatrix with reference to his or her family and property, or what is usually denominated an inofficious testament, and the jury find from the evidence in the cause that the will or wills and codicil propounded for probate are of such character, this, of itself, will impose on those claiming under the instrument the necessity of giving some reasonable explanation of the unnatural character of the will, or at least of showing that its character is not the offspring of mental defect, obliquity, or perversion."

(Y.) "If the jury find from the evidence that Wm. Knox or Mrs. Myra Semmes exercised such an influence over the mind and acts of Mrs. A. O. Knox as to take away from her her free agency, or to substitute their will for hers, then they will be authorized to find against such will as to the legacies tainted by said undue influence."

(Z.) "If the jury find from the evidence that Wm. Knox or Mrs. Myra Semmes are largely benefitted by the provisions of the instruments propounded for probate as the will

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and testament of Mrs. A. O. Knox, and further find that they had a controlling agency in procuring their execution, it is universally regarded as a very suspicious circumstance, and requiring the fullest explanation."

The jury having returned a verdict in favor of the will, the contestant took an appeal to the Circuit Court, where the case was heard on errors assigned on the record; and the judgment of the Probate Court being there affirmed, he now appeals to this court, and again assigns as error the several charges given, and the refusal of the charges asked, together with the allowance of the amendment asking probate of the will of 1883.

CHAS. WILKINSON, for appellant.

SEMPLE & GUNTER, TOMPKINS & TROY, *contra*.

COLEMAN, J.—The case comes to this court by appeal from the Circuit Court, to which court an appeal had been taken from the decree and judgment rendered by the Probate Court of Montgomery county, on a contest of the validity of the will of Mrs. Anna O. Knox. On June 28th, 1883, testatrix executed in due form an instrument purporting to be her last will and testament. One provision of this will was in the following words: "And whereas certain powers were vested in me by two deeds executed by my deceased husband, William Knox, the one to William S. Donnell, trustee, dated May 30th, 1853, and the other to Thomas J. Semmes, trustee, dated December 18th, 1856, over one half of the property, real and personal, conveyed by said deeds, and held under the said trusts thereof, to be exercised by last will; now therefore, under the execution of said power, I do hereby by my last will direct," &c., disposing of the property. So much of this instrument as contained the exercise of the power therein specified was offered, in connection with the will and codicil made by testatrix on the 16th day of September, 1889, and as a part of testatrix's will which was offered for probate. The bill of exceptions does not undertake to set out all the evidence; in fact there is nothing in the bill of exceptions which indicates that other evidence than that set out was not before the court. Looking at the two instruments together, we can not say the one executed in 1883 was not a testamentary exercise of the power authorized by the deeds of trust referred to; and there is certainly nothing in evidence to show that the power thus

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exercised was subsequently revoked. We find no error in the ruling of the court in this respect.

The grounds of contest were testamentary incapacity, undue influence, and fraud. What constitutes "testamentary capacity," or "sound and disposing mind and memory," as established in this State, is: if the testatrix had mind and memory sufficient to recall and remember the property she was about to bequeath, and the objects of her bounty, and the disposition which she wished to make—to know and understand the nature and consequences of the business to be performed, and to discern the simple and obvious relation of its elements to each other—she had, in contemplation of law, a sound mind.—*Kramer v. Weinart*, 81 Ala. 416; *Taylor v. Kelly*, 31 Ala. 59.

As to undue influence, the rule as declared in *Bancroft v. Otis*, 91 Ala. 290, is as follows: "The undue influence which will avoid a will, must amount to coercion or fraud; ideas which involve actual intent to control the testator against his will. The law never presumes fraud, or the evil intent and unlawful acts essential to the coercion here contemplated. There must be some proof of these things. They can not be considered to have been done, merely because the proponent had the power to coerce, or to defraud."

In *Eastis v. Montgomery*, 93 Ala. 293, it is said: "The undue influence which will avoid a will, must amount to coercion or fraud, an influence tantamount to force or fear, and which destroys the free agency of the party, and constrains him to do what is against his will. Mere persuasion or argument addressed to the judgment or affections, in which there is no fraud or deceit, does not constitute undue influence."

There was some evidence in the case of *Eastis v. Montgomery*, *supra*, which tended to show that, on the part of a preferred legatee, he was at times disrespectful, abusive, and ill-treated testatrix, as in the present case; but, as the evidence failed to show that such conduct operated to influence testatrix at the time of the execution of the will, it was held by a majority of the court that it was not improper for the court to instruct the jury, "that there was no evidence in the case of any threats to induce or cause testatrix to make the will contrary to her intention."

When the probate of a will is contested on the ground of mental incapacity, or undue influence, the real issue is as to the condition of the mind, or the operation and effect of undue influence, at the particular time of the execution of

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the will. The condition of the mind of the testate prior to the execution of the will, and all facts and circumstances which tend to elucidate its condition, or to show the freedom of the will, or that it was unduly coerced and influenced at the particular time, although such facts and circumstances may have existed or occurred previous to the time of the execution of the will, are admissible in evidence. *O'Donnell v. Rodiger*, 76 Ala. 226; *Kramer v. Weinart*, 81 Ala. 415. Tested by these principles, which have been often adjudicated, and others which are familiar, we find no error in the charges given by the court to the jury.

In charge No. 20 there appears evidently an error in copying. It is conceded by counsel on both sides, that the original charge read "if suffered" instead of "if sufficient," and should be thus corrected. With this correction the charge is free from error.

Charge "X" requested by contestant is objectionable for many reasons. It is misleading. In the next place, the law does not undertake to prescribe the duties of a testator to his family, in regard to the disposition of his property. And again, although a testator might not dispose of his property equally to his next of kin, that fact alone does not raise a presumption of mental incapacity or undue influence. The manner in which a testator disposes of his property is a fact in evidence, to be considered with other facts in determining the issue; but there is no conclusion of law from such a fact as to shift the burden of proof upon proponent, or the beneficiaries under the will, to show a sound mind, or freedom of will, on the part of the testator. It is a mere circumstance to be weighed by the jury. *Eastis v. Montgomery*, *supra*.

Charge marked "Y" was properly refused. As was previously declared in this opinion, to sustain the contest of the probate of a will on the ground of undue influence, the evidence must show that such undue influence operated at the time of the execution of the will. This principle is not recognized in charge Y. We also think the charge abstract. There is no evidence in the record to show "undue influence," as contemplated by the law.

Charge "Z" was properly refused. It is abstract, and is objectionable for the further reason, that it requires a higher degree of proof than the law demands. When the jury is reasonably satisfied from the evidence of any fact in civil cases, that is all that is required. But, when a charge asserts that any fact requires the "fullest" explanation, we

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have no legal scales to measure or weigh with any degree of definiteness the testimony necessary to meet this demand.

We find no error in the record, and the judgment is affirmed.

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Bill in Equity Contesting Probate of Will.

1. *Contest of will in equity* — Under statutory provisions regulating the probate and contest of wills (Code, §§ 1987-89, 2000), a person interested in the estate who did not contest the will when offered for probate, although he employed counsel, and was examined as a witness for the contestant, may contest it by bill in chancery at any time within five years.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 18th April, 1891, by Wm. C. Paull and his sister, grandchildren of Mrs. Anna O. Knox, deceased, against William Knox and Alex. Troy, her executors, and sought to set aside the probate of her last will and testament, and to remove the administration of the estate into the Chancery Court. The will had been admitted to probate after a contest by Edward N. Knox, another grandchild, as shown by the report of the case, *ante*, pp. 495-504; and the bill assailed its validity on the same grounds on which it was then contested. The defendants answered the bill, and in their answer incorporated two pleas in bar, the first setting up the decree admitting the will to probate as conclusive, on the ground that complainants were served with notice of the application for probate, "and cited to appear and contest said application, if they saw fit to do so; that they were examined as witnesses by said contestant, Edward Knox, on the trial of said matter; that they then had employed as their counsel, in the matter of protecting their interest in said property, the same counsel now representing them, and who represented said Edward Knox; and that, by advice of counsel, they purposely abstained from making themselves nominally parties to said contest, in order that they might file their present bill, and inaugurate a new contest, in the event of the failure of the contest by said Edward Knox. The chancellor held the

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pleas insufficient, and his decretal order is here assigned as error.

SEMPLE & GUNTER, and H. C. TOMPKINS, for appellant.

CHARLES WILKINSON, *contra*.

WALKER, J.—At the common law, the probate of a will by which real estate was devised was without effect upon the title to that species of property. Indeed, so far as real estate was concerned, there was no such thing as the probate of a will in the sense in which the term was used in reference to wills of personal property. The latter class of wills could be probated either in common form or in solemn form. A probate in common form was permitted without notice to parties in interest, and without affording them an opportunity to contest. They were not required to abide by the result of such a summary proceeding, if they chose to demand that the will be proved in solemn form, which involved a citation to all persons interested in the estate, so as to bind them by the decree rendered. Schouler on Executors and Administrators, § 65 *et seq.*; Woerner on American Law of Administration, §§ 215 *et seq.*

These common-law methods and distinctions are obsolete, as our statutes have established an entirely new system of probating and contesting wills of both real and personal property. A will, whether of real or personal property, must now be proved in the Probate Court, before any legal rights can be asserted under it; and it may be contested in that court before it has been admitted to probate.—Code, §§ 1976 and 1989. When it has once been probated in that court, in the mode prescribed by the statute, it can not be contested except by bill in chancery by a person interested therein, who has not already contested it.—Code, § 2000. It has been said that the provision for a contest by bill in chancery stands in the place of, and is the substitute for the proof in solemn form, as practiced in the Ecclesiastical Courts, when the will was of personal property, and of the action of ejectment at common law, when the will was of real estate.—*Lyons v. Campbell*, 88 Ala. 462; *Kumpe v. Coons*, 63 Ala. 448; *Johnston v. Glasscock*, 2 Ala. 218.

It is not to be understood from this statement that the contest by bill in chancery is merely the old proof in solemn form in a new dress, or that the admission of the will to probate in the mode prescribed by the statute amounts only to the old proof in common form. The attempt to

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trace resemblances between the methods of proving and contesting wills under the statute, and the system which it superseded, suggests certain analogies which are apt to mislead, as the proceedings under the two systems are widely dissimilar in important particulars. The statute does not contemplate any such *ex-parte* proceeding as the old proof in common form. Notice to the widow and next of kin of the decedent, and an opportunity for them to contest, are required whenever a will is offered for probate.—Code, §§ 1987 to 1989. These requirements give an original probate under the statute features similar to those of the old proof in solemn form. But the effect of the probate is not the same. A proceeding for the probate of a will, whether at common law or under the statute, is in the nature of a proceeding *in rem*, so that a judgment admitting the instrument to probate as the last will and testament of the decedent, until it is avoided in some mode prescribed by law, establishes, as against the whole world, the instrument as the law of descent and distributions governing the particular estate, unless it contravenes some rule of law or of public policy; and the judgment giving this operation to the instrument can not be collaterally impeached for irregularities which may have intervened in the proceedings after the jurisdiction of the court attached.—*Deslonde v. Darrington*, 29 Ala. 92; *Hall v. Hall*, 47 Ala. 290; *Brock v. Frank*, 51 Ala. 85; *Jordan v. Thompson*, 67 Ala. 469.

When the will is admitted to probate, without notice to a party who is entitled to notice, the failure to give such notice is a mere irregularity, which will authorize the setting aside of the probate on proper application.—*Sowell v. Sowell*, 40 Ala. 243. The proof in solemn form was conclusive, as a judgment *inter partes*, upon all persons interested in the estate who were summoned to see the proceedings. Modern Probate of Wills, 391. The same conclusive effect upon the widow or next of kin is not, as a result of the service of the statutory notice upon them, given to the judgment admitting the instrument to probate. It has long been settled that the proceeding under the statute for the probate of a will does not assume the form, and is not a suit *inter partes* as to the heirs or distributees, except as to those who come forward and have themselves made parties in the manner provided by law.—*Kumpe v. Coons*, 63 Ala. 455; *Allen v. Prater*, 35 Ala. 169. Those who were served with notice of the proceeding, but who did not contest the will in the Probate Court, are not bound by the judgment admitting the instrument to probate, as they would be by

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an ordinary judgment or decree rendered in a proceeding to which they were made parties by due service of process. Why? Because the statute provides in their favor a special mode of avoiding the effect of the judgment of the Probate Court admitting the instrument to probate. This is the provision: "Any person interested in any will, who has not contested the same under the provisions of this article, may, at any time within five years after the admission of such will to probate in this State, contest the validity of the same by bill in chancery, in the district in which such will was probated, or in the district in which a material defendant resides."—Code, § 2000.

This statute has existed in this State since the year 1806, having undergone some change in phraseology, but not in meaning.—*Watson v. Turner*, 89 Ala. 220; Aiken's Dig. 450. It seems that the original statute had been in force for a number of years before any provision was made, in the ordinary proceeding for the probate of the will, for notice to parties in interest. The earliest statute we have found which made provision for such notice was enacted in 1821. Toulmin's Digest, 887. It is urged in argument, that the provision in the statute of 1806 for a contest by bill in chancery, having been enacted at a time when no notice of the application for probate was required, was intended to afford a remedy for those who had had no notice of the original proceeding for the probate of the will; and that the subsequent statute requiring notice to parties interested in such proceeding did not extend the scope of the remedy by bill in chancery, but still left that remedy for the benefit of those only who had failed to be notified of the proceeding for a probate. This contention involves such a restriction of the scope of a contest by bill in chancery as would make it merely a new method of taking advantage of the failure to give notice to a party who was entitled to notice when the will was admitted to probate. As has been already stated, for such a mere irregularity, in such a case, the common law authorized the court granting the probate to set it aside on proper application.—*Sowell v. Sowell*, *supra*. The language of the statute does not indicate that the contest of a will by bill in chancery must be based primarily upon a mere irregularity in the original probate. When the statutes were first codified, both the provision for notice to parties in interest in the probate proceedings, and that for a contest of the will by bill in chancery, had long been in force. In view of the fact that there was already another remedy for setting aside a probate, in favor of one who had

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not received the notice to which he was entitled, it is to be presumed that, if it had been the intention to make the right to contest the will by bill in chancery dependent upon the existence of such mere irregularity in the probate proceeding, such intention would have been manifested in the language of the statute. No such intention is disclosed by the language used. The provision that "any person interested in any will, who has not contested the same under the provisions of this article, may . . . contest the same by bill in chancery," standing side by side with a provision for notice to all persons interested in the estate, of any application for the probate of a will, clearly implies that the right to contest in chancery is not cut off by the probate of the instrument after notice to the party subsequently desiring to contest. It is perfectly plain that the statutory system of probating and contesting wills contemplates that the widow and next of kin shall have notice of any application for the probate of a will of the decedent, and that, before any instrument is admitted to probate as a last will and testament, all persons interested therein, or in the estate of the decedent if he died intestate, should have an opportunity to contest its validity in the Probate Court. We think it is equally plain, that it was the intention of the statute to afford the further opportunity of contesting the will in the Chancery Court within five years, to any person interested in the will, who either did not have, or did not avail himself of the opportunity to contest it in the Probate Court.

Good reasons may be suggested for affording this additional opportunity to contest the validity of a will which has been regularly admitted to probate after due notice to all parties in interest. The application to prove the will usually follows close upon the death of the testator. The application comes on for hearing as soon as the short prescribed terms of notice have expired. It must frequently happen that persons interested in the proceeding are wholly unable, while it is pending, to inform themselves as to the instrument offered for probate, or of the circumstances attending its execution. Facts affecting its validity may be developed afterwards, and the failure to discover them, or to obtain the evidence to prove them, may have been without the fault or any lack of diligence on the part of those interested in making a contest. In view of such contingencies, there is manifest propriety and justice in allowing a reasonable time after a formal and regular probate, for a contest of the validity of the will by one who did not make

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a contest in the Probate Court. We have no doubt that this was the intention of the statute.

The appellees were not nominal parties to the contest inaugurated in the Probate Court. It is averred in plea number one that they were examined as witnesses on the trial of that contest, and that they had then employed as their counsel to protect their interest in said matter the same counsel who now represents them in this case, and who represents the contestant in the other case, and that they purposely by advice of said counsel abstained from making themselves nominally parties to said contest, that they might file their present bill and inaugurate a new contest. Conceding that the appellees could not maintain their present bill if they so aided and abetted the contestant in the other case as to become jointly responsible with him for what was done in his name alone, but really for their common benefit; yet the averments of the plea do not sufficiently show that such was the fact.—*Donegan v. Wade*, 70 Ala. 501.

The conclusion is, that the chancellor was correct in adjudging the first plea to be insufficient. The ruling on the second plea is not insisted on in the argument for the appellants.

Affirmed.

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Bill in Equity for Specific Performance of Parol Gift.

1. *Specific performance of parol gift of land.*—A court of equity will not enforce, against the executors and heirs of the deceased donor, the specific execution of a parol gift of land, where it appears that the donor placed the donee in possession, under the declared intention of giving the land to him, and afterwards requested or verbally directed his executors to execute a deed to him, and that the donee erected some improvements of inconsiderable value.

APPEAL from the Chancery Court of Cleburne.

Heard before the Hon. S. K. McSPADDEN.

AIKEN & BURTON, for appellants, cited *Forward v. Armistead*, 12 Ala. 124; *Evans v. Battle*, 19 Ala. 398; *Pinckard v. Pinckard*, 23 Ala. 649; 3 Pomeroy's Equity, § 1405; *Irwin v. Bailey*, 72 Ala. 79; *Clark v. Clark*, 122 Ill. 388.
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MERRILL & BRIDGES, ELLIS, BABER & JOHNSON, *contra*, cited *Spies v. Price*, 91 Ala. 166; *Price v. Bell*, 91 Ala. 180; *Brewer v. Brewer & Logan*, 19 Ala. 481; 1 Pom. Equity, § 430; 3 *Ib.* § 1409; 48 Amer. Rep. 640; *Brock v. Brock*, 90 Ala. 87; *Grigsby v. Osborn*, 82 Va. 371; *Hardesty v. Richardson*, 22 Amer. Rep. 57; *Freeman v. Freeman*, 3 *Ib.* 657; *Story v. Black*, 51 *Ib.* 37; 8 Amer. & Eng. Encyc. Law, 1338-49.

COLEMAN, J.—S. F. Blackstock, a minor, by his next friend filed the present bill, which may be regarded as a bill for specific performance, seeking to have the legal title to certain described lands divested out of the heirs of William Tolleson, deceased, and invested in the complainant. Upon the filing of the bill an injunction issued, restraining the executors from prosecuting a suit in ejectment against Blackstock to recover possession of the land in controversy.

It is unnecessary to consider at much length one aspect of the case, which seems to have been relied upon, to some extent, in the original bill; and that is that the executors, who were the sole parties to the original bill, actively and fraudulently interfered to prevent William Tolleson in his last sickness from executing a deed to the said Blackstock, or that William Tolleson, relying upon the promise of the executors to make a deed after his death, conveying the lands to the said Blackstock, was thereby induced to leave the deed unexecuted in his life-time. The bill was amended so as to make the widow and all the heirs of William Tolleson parties defendant. It is not pretended that William Tolleson himself undertook in writing, or by written instrument authorized and empowered the defendants, or either of them, to make such deed or conveyance, or that the other respondents, heirs of the decedent who were not executors, and some of whom were not present, interfered in any way, by promise or otherwise, to prevent the execution of the deed by deceased to Blackstock, if such was the intention and desire of decedent.

Section 1845 of the Code reads as follows: "No trust concerning lands, except such as results by implication or construction of law, can be created, unless by instrument in writing, signed by the party creating or declaring the same, or his agent or attorney lawfully authorized thereto in writing." This statute has been frequently considered in this court, and its proper construction may be regarded as practically settled.—*Brock v. Brock*, 90 Ala. 87; *Patton v. Beecher*, 62 Ala. 579; *White v. Farley* 81 Ala. 563; *Manning*

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Pippen, at present term; *Kelly v. Karsner*, 72 Ala. 106. No relief could be granted upon the ground that the executors refused to execute a conveyance of the land to complainant, without a plain violation of this statute.

The other grounds for relief made by the bill and testimony may be stated as follows: When the complainant, Blackstock, was about three years of age, he was left an orphan, and the deceased, William Tolleson, took him as a member of his family, raised, educated, and in all respects treated him as one of the children. As the children of William Tolleson married, or attained their majority, he gave each of them by deed of conveyance a tract of land. In May, 1888, the complainant Blackstock, being then about 17 years of age, married, and in the fall of that year William Tolleson put him in possession of the land in controversy, but made him no deed of conveyance. In September the following year, the deceased was stricken with paralysis, and after lingering ten or fifteen days died. He had made his will and appointed his executors many years before, but after the time when the complainant was received into his family as one of its members. The bill then proceeds as follows: "In consideration of love and affection gave and placed him in possession of the following lands," describing them; "that he went into possession of said lands under a parol gift from the said William Tolleson, and has continued in possession thereof until the present time, using them in all respects as his own, and that he has made valuable and permanent improvements thereon, . . . upon his faith in said gift," &c.

The record is very voluminous, many witnesses having been examined by both sides. We have read all the evidence with care, and our conclusion is that the weight of the evidence does not establish that an absolute gift of the land was made, or intended to be made, at the time the deceased put the complainant in possession of it. As often expressed by him, his purpose was to see how the complainant would succeed, and if satisfactorily "he aimed" to give it to him. The possession was merely permissive, and not under an absolute gift. We incline to the view from all the evidence that, during his last sickness, William Tolleson fully purposed to perfect a gift of the land in a legal way. Whether the failure was the result of not having a deed prepared, or the neglect of not calling his attention to the fact that one had been prepared for his signature, or that he relied upon his executors to carry out his verbal request to that effect, it is unnecessary to consider. The fact is

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undisputed, that he neither signed any instrument himself conveying the land, nor authorized in writing any one to execute such a conveyance. The question arises, can complainant enforce against the heirs of William Tolleson a specific performance of this verbal voluntary promise or request made by William Tolleson, and require the heirs to convey to complainant the legal title, which descended to them on the death of their father. If William Tolleson had not died, but had recovered from his last illness, could the complainant maintain the present bill against him? If he could not, it will not lie against his heirs. The principle involved has been directly adjudicated in this State. A verbal promise by a father to his son, that if he will remove from North Carolina, and settle in Alabama, he will give him a particular plantation, being a mere gratuity, can not be enforced against the heirs or devisees of the father after his death, although the father may have put the son in possession of the land before his death.—*Forward v. Armistead*, 12 Ala. 124. This principle was re-affirmed in the case of *Evans v. Battle*, 19 Ala. 402, and again in *Pinckard v. Pinckard*, 23 Ala. 650.

The cases cited by appellee are of that class which grew out of a contract, based upon a valuable consideration, and the distinction is expressly made in such cases, and those which are founded upon mere gratuitous promises.—23 Ala., *supra*, and *Stone v. Britton*, 22 Ala. 543. The other cases cited involve a different principle, and one which does not arise here.

The improvements made, according to complainant's own testimony, amounted to only about eighteen dollars, a mere trifle as compared with the value of the land, and amounts to a small per cent. of its annual rental value, as shown by the evidence. We have declared that the evidence does not support the allegation that complainant went into possession under a parol gift, but rather a permission to use and occupy during the pleasure of the owner, and that there was no absolute intention or purpose to make a gift until during the last illness of the owner. Under the influence of the foregoing authorities, complainant would not be entitled to relief under either aspect of the evidence, and an amendment of the bill in this respect would avail complainant nothing.

The enforcement of the law as we interpret it may work a hardship in some cases, but to grant relief, upon the evidence as disclosed in this record, would be to disregard the statute itself, and destroy the safeguards placed upon land titles and trusts concerning lands, by its provisions.

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The decree of the chancellor must be reversed. The cause will be remanded, that the court below may render a decree in accordance with the rules here declared.

The orders made by the chancellor in this case after the appeal was taken are not properly before us on this appeal. On the remandment of the case, the court will have authority to hear and determine and make all proper and necessary orders in regard to the deed heretofore executed by the register.

Reversed and remanded.

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Statutory Action in nature of Ejectment.

1. *Homestead in tracts of land not contiguous.*—Two tracts of land, containing respectively forty and fifty acres, and of value less than \$2,000, may constitute an exempt homestead, if occupied and cultivated together, and used as a common source of family support, though a half mile or more apart.

2. *Conveyance of homestead; validity as against creditors.*—Creditors can not complain of a conveyance of his homestead by their debtor, since they are not thereby injured.

3. *Repugnant defenses.*—When the defendant, claiming under a conveyance from a judgment-debtor, has successfully excluded evidence assailing the conveyance for fraud, on the ground that the property conveyed was the homestead of the debtor, he is precluded from afterwards contending that it was not in fact the debtor's homestead.

4. *Alienation of homestead; subsequent certificate of acknowledgment.* A conveyance of the homestead, signed by husband and wife, but without the statutory certificate of acknowledgment by the wife (Code, § 2508), is a nullity; and the officer before whom it was acknowledged has no power, at a subsequent time, to alter or add to his certificate, or to make a new certificate, without a re-acknowledgment.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. JOHN B. TALLY.

This action was brought by John G. Winston against Mrs. A. Shubert, tenant in possession, to recover two small tracts of land, one containing 40 acres, and the other 55 acres; and was commenced on the 3d December, 1889. The plaintiff claimed as a purchaser at sheriff's sale, under a judgment and execution against James G. Coleman; and he produced his judgment, execution, and sheriff's deed, Vol. 95.

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97	371
96	514
102	308
96	514
104	442
96	514
107	327
107	400
96	514
118	315
96	514
125	324
96	514
130	292
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which showed that the judgment was rendered on the 23d February, 1885, the execution levied on the land on the 24th September, 1885, and sheriff's deed to plaintiff, as the purchaser at the sale, dated November 5, 1885. J. W. Hodges intervened as the landlord of Mrs. Shubert, and defended the suit on his own title, claiming under a purchase from said James G. Coleman; and he produced and proved the execution of his deed from said Coleman and wife, which was dated 20th February, 1885, and recited the payment of \$1,100 as its consideration. Two certificates of acknowledgment were indorsed on the deed, taken by the same justice of the peace, and each dated 20th February, 1885, one by the grantor and his wife, in ordinary form, and the other by the wife alone, on examination separate and apart from her husband; and two indorsements of filing for record, one on the 1st September, 1885, and the other on the 15th February, 1886. The justice of the peace testified, that he took the acknowledgments, and wrote the certificates; that he examined Mrs. Coleman separate and apart from her husband; that this was done on said 20th February, 1885; that Mrs. Coleman did not again acknowledge the deed before him, and that he had no recollection of writing the second certificate at a day subsequent to its date. The defendant himself testified, that Mrs. Coleman was examined by the justice separate and apart, at the time the deed was executed and acknowledged, but only the first certificate was then appended to it; that he discovered the defect in the certificate after he had filed the deed for record, procured the justice to add the second certificate, and again filed it for record; and that Mrs. Coleman was not present when this was done. The record copy of the deed, when first recorded, showed only the first certificate of acknowledgment.

The court charged the jury, on request of the plaintiff, "that if Coleman cultivated the two tracts of land together, and his family drew supplies from both of them, and the two tracts were used together, then the bottom tract was as much Coleman's homestead as the tract on which his house was situated;" also, that if the land was Coleman's homestead on the 20th February, 1885, his deed to Hodges, of that date, conveyed no title, unless duly signed by both of them, acknowledged by Mrs. Coleman on examination separate and apart from her husband, and so certified by the officer; and that the justice of the peace who took the acknowledgment had no authority, on a subsequent day, to amend or alter his certificate, or to make a new certifi-

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icate, without a re-acknowledgment. The defendant excepted to each of these charges, and here assigns them as error, with other matters.

J. E. BROWN, for appellant.—(1.) There is no evidence that the lands sued for were ever claimed or selected by the debtor as his homestead, and without such claim and selection the right was never perfected. He might waive the right to claim a homestead, just as he might abandon his homestead, or sell and convey it; and a creditor can not be allowed to assert a right for him which he has waived. The bill of exceptions sets out all the evidence introduced on the trial, and shows that there was no proof of title in Coleman. It only shows that he and his wife, being in possession, sold and conveyed to Hodges, for valuable consideration, before the rendition of plaintiff's judgment, and delivered possession to him. It may be that the land belonged to Coleman's wife, and that no claim of exemption was interposed on that account. As to the necessity of a claim and selection, see *Block v. George*, 83 Ala. 184; *Clark v. Spencer*, 75 Ala. 57; *Clancy v. Stephens*, 92 Ala. 577. (2.) The justice who took the acknowledgment had power, "within reasonable limits, to amend his certificate, so as to make it speak the truth."—*Jordan v. Corey*, 52 Amer. Dec. 516.

O. D. STREET, *contra*, cited *Hall v. Dicus*, 83 Ala. 159; *Ventress v. Griffith*, 91 Ala. 356; *Alford v. Lehman*, 76 Ala. 526; *Striplin v. Cooper*, 80 Ala. 256; *Smith v. Pearce*, 85 Ala. 264; *White v. Farley*, 81 Ala. 563.

WALKER, J.—The two parcels of land involved in this suit are not contiguous. The house in which James G. Coleman, the judgment-debtor, lived with his family, was on the forty-acre tract. In connection with this tract he used the other tract containing fifty-five acres, cultivating it every year, and getting from it a support for his family. The aggregate value of the two tracts was less than two thousand dollars. They were occupied and cultivated in connection with each other, and were used as a common source of family support. Together they could constitute a homestead.—*Dicus v. Hall*, 83 Ala. 159. The facts as to the judgment-debtor's occupancy and use of the two parcels together were testified to by the witness Thomas Coleman. After he had testified, evidence offered by the plaintiff to show that the sale of the land by the judgment-

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debtor to Hodges was fraudulent and void as to the former's creditors was objected to by the defendants, on the ground that the testimony of the witness Thomas Coleman showed the land sued for to have been the homestead of James G. Coleman at the time of the execution of his deed; and this objection was sustained. Assuming that the lands constituted a homestead, this ruling was correct, as the plaintiffs in a simple money judgment, and those claiming under them, have no right to complain of the disposition of homestead property which could not be subjected to their demand. The testimony of the witness Thomas Coleman, as to the judgment-debtor's occupancy and use of the two parcels together, remained wholly uncontroverted. The defendants, in making the objection on the ground mentioned, precluded themselves from contending that the two parcels together did not constitute a homestead. Having obtained a substantial advantage by taking and successfully maintaining the position that the lands in question constituted a homestead, they estopped themselves from claiming, on the same state of evidence, that they were not a homestead. They could not support one position of defense by claiming that the lands constituted a homestead, and at the same time obtain the advantage of another position which involved a denial of the homestead character of the land. A defendant who, for the purpose of maintaining a defense, has deliberately represented a thing in one aspect, can not be permitted to contradict his own representation by giving the same thing another aspect in the same case.—*Caldwell v. Smith*, 77 Ala. 157; *Hill v. Huckabee*, 70 Ala. 183; *Herman on Estoppel*, (4th Ed.) 687.

James G. Coleman was living on the land as his homestead when he and his wife signed and delivered the deed to the defendant Hodges. Without the separate acknowledgment of the wife, and the certificate thereof as required by the statute, that deed was a nullity.—Code, § 2508. This court, after a full consideration of the question, has decided that, when a deed has been delivered to the parties, and has been accepted for record, or as the complete execution of the instrument, the officer before whom the grantors acknowledged it has no power to alter or add to his certificate, or to make a new certificate, without a re-acknowledgment. *Griffith v. Ventress*, 91 Ala. 366. The reasoning in that case to support the conclusion that the officer taking the acknowledgment is without power, is equally applicable whether the officer, when the alteration or addition, or the new certificate is made, is holding his office under the same election

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or appointment under which he held at the time the original acknowledgment was taken, or has gone out of office, or holds office under a new election or appointment. The evidence in the present case shows that the certificate of the separate acknowledgment of the wife was not made until after the conveyance had been delivered and once recorded, and that it was made without re-acknowledgment, and after the lien of the execution under which the plaintiff purchased had attached. Without the wife's separate acknowledgment, and the certificate thereof, the deed to the defendant Hodges was a mere nullity when the lien of the execution attached. The evidence showing, without conflict, a judgment against James G. Coleman, the issue of execution thereon, a levy and sale under the writ, and the sheriff's deed to the plaintiff, all in due form, and that at the time of the levy and sale the land had ceased to be the homestead of the defendant in the judgment, and that his attempted conveyance thereof was a mere nullity—the plaintiff was entitled to recover. If there was error in any of the rulings of the court of which the appellants complain, it was error without injury. There was no evidence to support any defense.

Affirmed.

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Bill in Equity between Mortgagees, for Injunction of Sale under Power, Adjustment of Priorities, and Foreclosure.

1. *Waiver of mortgage lien construed.*—A letter addressed by a merchant who held a mortgage on two or more tracts of land, on one of which it was a first lien, to a firm of commission-merchants who held another mortgage on the lands, in these words: "If you will advance to G. & Co. [mortgagees] an additional amount of \$2,500, for the purpose of making their arrangements to carry on their mercantile business and to make their crops, so as to make their indebtedness to you, including the above \$2,500, in all \$10,500, I will and do hereby waive my mortgage lien on the land and personal property of said G. & Co., to the extent of said indebtedness and interest, for and on your account only,"—applies not only to the \$2,500 additional advance, but to the entire indebtedness (\$10,500) and interest.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 1st July, 1891, by S. Roman against R. E. Bolling, and sought to enjoin a sale of Vol. 95.

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lands by the defendant under a power in a mortgage executed to him by Giddens & Co., a mercantile partnership; also to adjust the priorities and equities of the parties under the mortgages held by them respectively, and for a foreclosure. The complainant was the owner, by assignment from Lehman, Durr & Co., of two mortgages executed to them by said Giddens & Co., the first conveying a tract of land in Montgomery county and a tract in Lowndes county, and the second conveying the same lands and another tract in Crenshaw county, with certain personal property. The first mortgage was given on the 20th January, 1886, and the lands conveyed by it were then subject to the lien of a prior mortgage in favor of J. A. Tyson. The defendant's mortgage was dated January 29th, 1886, and was a first lien on the lands in Crenshaw county, but a third lien on the other lands. The second mortgage to Lehman, Durr & Co. was dated February 5th, 1887, and was given to secure an indebtedness of \$10,500, which was the balance due on the former indebtedness and additional advances of \$2,500, made, as the bill alleged, on the faith of a waiver by the defendant of his prior lien on the lands in Crenshaw county. This waiver was contained in a letter addressed to them by the defendant, which was dated at Montgomery, February 5th, 1887, and in these words: "If you will advance to Giddens & Co. an additional amount of \$2,500, for the purpose of making his [their] arrangements to carry on their mercantile business and to make their crops, so as to make their indebtedness to you, including the above \$2,500, in all \$10,500, I will and do hereby waive my mortgage lien on the land and personal property of said Giddens & Co., to the extent of said indebtedness and interest, for and on account of Lehman, Durr & Co. only." The bill alleged that this instrument had never been recorded, and was not subject to registration; that a sale by the defendant under the power in his mortgage would involve complainant in litigation with the purchaser, and would impair or defeat his priority of lien; and he therefore prayed an injunction to prevent the sale, a foreclosure of the several mortgages, an adjustment of the priorities, &c.

After answer filed, in which the defendant insisted that the waiver expressed in the letter extended only to the \$2,500 additional advances made to Giddens & Co. on the faith of it, he moved to dissolve the injunction. The chancellor overruled and refused the motion, and his decretal order is assigned as error.

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E. P. MORRISSETT, for appellant.

TOMPKINS & TROY, *contra*.

STONE, C. J.—We can not agree with appellants in the construction of the written agreement of R. E. Bolling, bearing date February 5, 1887. The first employment of the word “indebtedness,” in the agreement, refers unmistakably to the aggregated sum—the past indebtedness of eight thousand dollars, supplemented with the additional twenty-five hundred dollars to be advanced. The language of the writing is, “so as to make their indebtedness to you, including the above twenty-five hundred dollars, in all ten thousand five hundred dollars.” We think and hold that the proper interpretation of the instrument is, that Bolling’s offer was to permit the entire ten thousand and five hundred dollars to take precedence over his, Bolling’s, mortgage on the lands in Crenshaw county.

The answer sets up in avoidance of the injunction, and of the suit, *first*, that there is a mistake in the writing, and that it does not truly express the agreement of the parties. This is affirmative matter set up, and, if proved, may be a defense to the claim, in whole or in part. It furnishes no ground for dissolving the injunction. *Second*, while the answer does not, and probably could not, deny the complainants’ claim, as matter of knowledge, it nevertheless fails to admit its justness as claimed, and so questions it as to render it necessary to take the account, and to ascertain to what extent, if any, the original debt remains unpaid. The waiver was as to that debt, and none other. Only to the extent that debt, with its accruing interest, remains unsatisfied, is Bolling’s mortgage to be postponed. This is a question for proof, and does not arise on the motion to dissolve the injunction on the denials in the answer.

Affirmed.

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Action on Accepted Draft, by Payee against Accommodation Acceptor.

1. *Discount of draft by banker, at usurious rate of interest.*—When a draft, having been accepted by the drawee for the accommodation of the drawer, is presented by the latter to the banker to whose order it is made payable, and who then advances the amount to him, deducting a certain per cent. in advance for the use of the money until the maturity of the draft, the transaction is a *discount* of the draft within the meaning of the statute which makes it a misdemeanor for any banker to “discount any note, bill of exchange or draft, at a higher rate of interest than eight per cent. *per annum*” (Code, § 4140); and if the sum deducted, excluding difference of exchange, is more than legal interest, the banker can not maintain an action against the acceptor, the contract being unlawful.

2. *Same; constitutionality of statute.*—The statute which makes it a misdemeanor for “any banker” to discount any note, bill or draft at more than legal interest (Code, § 4140), applies to banking corporations as well as individual bankers, and is not an unlawful exercise of class legislation.

APPEAL from the City Court of Birmingham.

Tried before the Hon. W. W. WILKERSON.

This action was brought by the appellee, a private corporation located in Birmingham, against William Youngblood, and was founded on the defendant's acceptance of a draft for \$1,000, drawn on him by Swem & Thomas, in favor of the plaintiff; which draft was dated at Birmingham, September 3d, 1889, payable to the plaintiff's order, thirty days after date, and accepted by the defendant for the accommodation of said Swem & Thomas. The plaintiff advanced the money on the accepted draft to Swem & Thomas, deducting \$11.34 for the use of the money until its maturity; and several partial payments having been made on the draft, this action was brought to recover the balance due. The defendant filed a special plea, alleging, in substance, that plaintiff was a banker, and acquired the draft by a discount of it at a greater rate of interest than eight per cent., in violation of section 4140 of the Code. The plaintiff demurred to this plea, on the ground that the facts stated did not show a discount of the draft, and because said statute was unconstitutional. The court sustained the demurrer, and

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108	410
120	160
110	566
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114	380
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118	154
95	521
126	408
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138	243
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142	659

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issue being joined on other pleas, one of which set up usury, and a jury being waived, rendered judgment for the plaintiff, for the balance due, without interest. The judgment on the demurrer is assigned as error.

TALIAFERRO & HOUGHTON, for the appellant.—(1.) The plaintiff acquired the draft by an illegal discount of it, and therefore can not recover.—Code, § 4140; 3 Rand. Com. Paper, § 1704; Amer. & Eng. Encyc. Law, *Discount*; Bouv. Dictionary, tit. *Discount*; *Saltmarsh v. P. & M. Bank*, 14 Ala. 668-77; *Mauldin v. Br. Bank*, 2 Ala. 513; *Carlisle v. Hill*, 16 Ala. 398; *Faris v. King*, 1 Stew. 259; *Insurance Co. v. Quinn*, 73 Ala. 558; 80 Ala. 258; *Miller v. Bates*, 35 Ala. 580. That a contract founded on an act prohibited by statute is void, see *Woods v. Armstrong*, 54 Ala. 150; s. c., 25 Amer. Rep. 671, and note; *Williams v. Evans*, 87 Ala. 725; *Robertson v. Hayes*, 83 Ala. 290; *Harrison v. Jones*, 80 Ala. 412; *Shippey v. Eastwood*, 9 Ala. 198; *O'Donnell v. Sweeney*, 5 Ala. 468. (2.) The statute now embraces individual bankers and banking corporations, and is not unconstitutional.—*Carter v. Coleman*, 84 Ala. 256; *Harrison v. Jones*, 80 Ala. 412; *Ex parte Marshall*, 64 Ala. 266; *Railroad Co. v. Baldwin*, 85 Ala. 619; *Mayor v. Yuille*, 3 Ala. 137; *Shelton v. Mayor*, 30 Ala. 540; *McCreary v. State*, 73 Ala. 480. That a statute is not unconstitutional because it conflicts with natural right, see *Dorman v. State*, 34 Ala. 216-31.

GILLESPIE & SMYER, *contra*.—(1.) The transaction between the parties was simply a loan of money, and not a discount of the draft.—*Saltmarsh v. P. & M. Bank*, 14 Ala. 677; *Fleckner v. U. S. Bank*, 5 L. C. P. Co. (U. S.) 634; *Bank v. Johnson*, 26 *Ib.* 742. (2.) The statute does not prohibit the discounting of notes, bills and drafts, but only the taking of illegal interest; and if the transaction be within its terms, the penalty incurred is the forfeiture of the interest under the general law against usury. A contract made in violation of a general statute is void only when the subject-matter thereof is prohibited.—*Dudley v. Collier & Pinckard*, 87 Ala. 433; *Campbell v. Segars*, 81 Ala. 259; *Harrison v. Jones*, 80 Ala. 412; *Renfro v. Lloyd*, 64 Ala. 95; *Guano Co. v. Dawkins*, 57 Ala. 115; *Woods v. Armstrong*, 54 Ala. 150. If the plaintiff were a National bank, the principal would not be forfeited, and there should be no discrimination against a State bank. 23 L. C. P. Co. (U. S.) 126; 91 Ala. 217. (3.) The statute is unconstitutional.—*Carter Bros. v. Coleman*, 84 Ala. 259; *Smith v. L. & N. Railroad Co.*, Vol. 95.

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75 Ala. 450; *Home Protection Ins. Co. v. Richardson*, 74 Ala. 466; *Green v. State*, 73 Ala. 26; *Railroad Co. v. Morris*, 65 Ala. 194; *Ziegler v. Railroad Co.*, 58 Ala. 594; *Mayor v. Insurance Co.*, 53 Ala. 170.

McCLELLAN, J.—The terms “discount” and “loan” are employed in the books indiscriminately and synonymously in all cases where compensation for the use of money advanced is retained out of the gross sum at the time of the advancement. Thus it is said: “Discounting, or loaning money, with a deduction of the interest in advance, is a part of the general business of banking,” &c.—2 Amer. & Eng. Encyc. of Law, p. 92. And a discount is thus defined: “By the language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank. The term ‘discount,’ as a substantive, means the interest reserved from the amount lent at the time of making the loan; as a verb, it is used to denote the act of giving money for a note or bill of exchange, deducting the interest.” 5 Amer. & Eng. Encyc. of Law, 678–9. A distinction between discounts and loans is sometimes enforced by the terms of statutes obtaining in the premises; but, in the absence of any element of this kind—whenever the words stand alone upon the signification accorded them in the general law—every loan upon evidences of debt, where the compensation for the use of money till the maturity of the debt is deducted from the principal and retained by the lender at the time of making the loan, is a discount.—*Fleckner v. U. S. Bank*, 8 Wheat. 351; *Nat. Bank v. Johnson*, 14 Otto, (U. S.) 276; *Saltmarsh v. P. & M. Bank*, 14 Ala. 677; *Loan Co. v. Towner*, 13 Conn. 259; *Pope v. Capitol Bank*, 20 Kans. 440; *Bank v. Baker*, 15 Ohio St. 85; *Talmadge v. Pell*, 7 N. Y. 328; *Bank v. Bruce*, 17 N. Y. 515; *Freeman v. Britton*, 2 Harr. (N. J.) 206.

On these principles, we entertain no doubt that the transaction in and by which plaintiff acquired the draft of Swem & Thomas, which had been accepted by defendant for the accommodation of the drawers, by advancing to Swem & Thomas the face value thereof, less a certain per cent. thereon which was retained by plaintiff for the use of the gross sum so advanced for the time of the paper, was a discounting of the draft within the usual sense of that term, and hence within the meaning of the word as employed in section 4140

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of the Code, there being nothing in the context of that section importing a different significance.

The section referred to is as follows: "Any banker who discounts any note, bill of exchange, or draft, at a higher rate of interest than eight per cent. *per annum*, not including the difference of exchange, is guilty of a misdemeanor." It is admitted that the plaintiff discounted the draft in question at a higher rate of interest than eight per cent. *per annum*; or rather, it is admitted that the plaintiff, which is a banking corporation, acquired the draft by paying or advancing thereon the sum nominated therein, less about one per cent. which was deducted and retained by it as compensation for the use of the money till maturity of the paper, which was due and payable at thirty days. This, as we have seen, was a discounting of the draft within the statute quoted; and the rate of discount being equal to twelve per cent. *per annum*, the discount was violative of the statute, and involved a crime on the part of plaintiff, assuming the constitutionality of the enactment.

This was section 4435 of the Code of 1876. It was then directed against *individual* bankers only. As it then stood, it was adjudged to be unconstitutional by this court in *Carter Bros. & Co. v. Coleman*, 84 Ala. 256. The ground of that decision is not expressly stated, but it was based on authorities (*Smith v. L. & N. R. R. Co.*, 75 Ala. 449, and *S. & N. R. R. Co. v. Morris*, 63 Ala. 193), a reference to which leaves little doubt that the statute was held invalid because it did not apply also to *corporations* engaged in the business of banking; and this is made manifest by the further statement of the court: "The statute has since been changed (Code, 1886, § 4140), with what effect we need not inquire." The change here referred to consists in the omission from its last codification of the word "*individual*," the effect being to make it applicable to corporate as well as individual bankers, and to obviate the infirmity pointed out in *Carter Bros. & Co. v. Coleman*. We do not conceive that there could have been any other objection to the constitutionality of the original enactment; and, that objection having been eliminated by amendment, we are clear in the conviction that it is now a valid and efficacious exercise of legislative power. It is quite erroneous to say that it is class legislation, in a vitiating sense. It does apply to a class, of course, as do very many other statutes in our jurisprudence whose validity has never been, and can not be successfully questioned; as, for instances, statutes regulating railroads, physicians, lawyers, common carriers, warehousemen, &c.; but,

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like all these, its application is to all of a number of persons, natural and artificial, whose occupation and business mark the lines of the class to which they belong, and as members of which they are each and all, without invidious distinction whatever, amenable to its terms solely because they pursue an avocation which the law-making power conceives should be specially regulated.

The business of banking is well understood and defined. A chief part of it, in most instances, consists in the lending of money, and this is almost always done by discounting evidences of debt. The opportunities and temptations of persons engaged in it to evade or violate laws against usury are so much greater and more frequent than those of persons not so engaged, as to raise up a necessity for the application of more stringent measures of repression than are necessary in respect of other businesses and persons engaged therein. And it is this consideration which differentiates the business of banking from all others in respect of usury, and furnishes a predicate for such legislation as is embodied in section 4140 for the regulation of banking and bankers, which does not exist as to any other occupation; just as the inherent dangers involved in the operation of a railroad differentiates that from other occupations, and necessitates legislation which would be entirely unnecessary and innocuous in respect of the business of farming, for instance. And upon this ground statutes of this character, when made to apply to all persons, whether individuals or corporations, regulating occupations, have been uniformly upheld. Judge Cooley, in this connection, says: "The legislature may also deem it desirable to prescribe particular rules for the several occupations, and to establish distinctions in the rights, obligations, duties and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit; and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable and impolitic to do the same for persons engaged in some other employments. If the law be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge."—Cooley's Const. Lim., pp. 480–81.

In a recent case, a statute of Kentucky which gave a right of action against railroads to the representatives of persons, not in the service of the road, killed through the negligence

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of railroad employes, came before the Supreme Court of that State on the question of its constitutionality. The argument was that this was class legislation in that it applied to railroads alone, and no liability was imposed upon other common carriers. The court, in holding this position to be unsound, among other things, said: "This statute does not single out a particular individual or corporation, and subject him or it to special burdens or peculiar rules. Nor does it do so as to some of those engaged in a particular business, as for instance, the Chinese in the laundry business, and which the Supreme Court of the United States condemned in the case of *Soon Hing v. Crowley*, 113 U. S. 703, but it subjects all in a particular business to its provisions, just as a law relative to banks and the conduct of banking would subject all in that particular business to its terms. Legislation of like character is to be found upon the statute books of every State."—*Louisville Safety Vault & Trust Co. v. Louisville & Nashville R. R. Co.*, 17 So. W. Rep. 567; s. c., 14 L. R. A. 579 and notes; and to like effect in principle are the following cases therein cited: *Railway Co. v. Mackey*, 127 U. S. 205; *Railway Co. v. Beckwith*, 129 U. S. 27; and so, on the same principle, a statute fixing the rate of interest which may be charged by pawnbrokers, is no violation of a constitutional provision for "uniform laws." *Jackson v. Showle*, 29 Cal. 267. And the general power of the legislature to regulate occupations and businesses of all kinds, keeping within the principle that all members of a particular class proposed to be regulated must be equally amenable to the regulations made, has been time and again declared by this court.—*Mayor v. Yuille*, 3 Ala. 137; *Ex parte Marshall*, 64 Ala. 266; *Harrison v. Jones*, 80 Ala. 412; *L. & N. R. R. Co. v. Baldwin*, 85 Ala. 619; *McDonald v. State*, 81 Ala. 274. Upon a consideration of the foregoing authorities, and the reasons which underlie them, we are, we repeat, without doubt in the conclusion that section 4140 of the Code of 1886 is a constitutional enactment.

It is equally free from doubt, in our opinion, that the effect of this statute on the transaction in and by which the plaintiff acquired the draft and acceptance sued on would vitiate it *in toto*, and avoid and defeat all right on the part of the plaintiff under that contract. The title upon which plaintiff relies is one which he acquired in confessed and palpable violation of a law which denounced his act in that regard as a crime. The doctrine is nowhere more firmly established than in Alabama, that no rights can spring from or be rested upon an act in the performance of which a

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criminal penalty is incurred, and that all contracts which are made in violation of a penal statute, are as absolutely void as if the law had in so many words declared that they should be so.—*Moog v. Hannon's Adm'r*, 93 Ala. 503, where our cases are collated. And the logical consequence of the doctrine, in a case like the present one, involving the acquisition of a note, bill or draft by criminal means, is that not only is the act of acquisition a crime and invalid, but the paper itself—the supposed security for money advanced in contravention of the statute—is absolutely void, in the hands, at least, of him who comes by it through the commission of a penal offense.—*Pennington v. Townsend*, 7 Wend. 276; *Bank of U. S. v. Owens*, 2 Peters, 527.

The rulings of the trial court on the pleadings, and its finding and judgment on the facts, are opposed to these views. The judgment is reversed, and the case having been tried without jury below, judgment will be here rendered for the defendant.

Reversed and rendered.

Seymour v. Farquhar & Son.

Application for Rehearing after Judgment at Law.

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1. *Rehearing at law after final judgment; amendment of petition, and substitution of lost papers.*—A judgment of the appellate court, on application for *mandamus*, vacating and annulling an order granting a *supersedeas* and rehearing after final judgment, or requiring the lower court to vacate and annul it, because it was rendered in vacation, leaves the petition itself still pending and unaffected; and it is the duty of the lower court to proceed with it, hearing demurrers, allowing proper amendments, substitution of lost papers, &c., as in other cases.

APPEAL from the Circuit Court of Fayette.

Tried before the Hon. SAM. H. SPROTT.

JOHN B. SANFORD, and A. B. MCEACHIN, for appellants.

MCGUIRE & COLLIER, *contra*.

COLEMAN, J.—Farquhar & Son recovered a judgment in trover against appellants. Under sections 2872 and 2873 of the Code, the defendants applied for a rehearing. In

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vacation, the judge presiding granted a rehearing in accordance with the petition, and directed the clerk to issue a *supersedeas*, or restraining order, to restrain the collection of the execution issued upon the judgment. Upon application to this court, the order of the judge granting a rehearing in the cause, and ordering a *supersedeas* or restraining order, was held to have been improperly made in vacation, and that the facts averred in the petition should have been heard and tried at the next term of the court, as provided in section 2876 of the Code. At the following term of the Circuit Court of Fayette county, in which the judgment had been recovered, the petitioners for a rehearing moved the court for leave to amend the petition as set out in the proposed amendment, and also for leave to substitute certain papers which, according to the averments of the motion, were a part of the original petition for a rehearing, and which in transmission to the judge were lost. The court refused to grant the amendment to the petition, or to consider the evidence offered to show the loss of a part of the papers of the original petition; holding that, under the order of the Supreme Court, the trial court had no discretion or further jurisdiction than to vacate the order granting the rehearing, and to dismiss the petition. From the action of the court refusing to allow the amendment and the substitution of the papers, and from the judgment vacating the former order granting a rehearing and dismissing the petition, the present appeal is prosecuted.

When the case was here before, the decision of this court had no other scope or effect than to require that the order of the lower court, granting a rehearing and *supersedeas*, or restraining order, be annulled and vacated. It left the petition pending, to be heard at the first subsequent term of the trial court, under section 2876 of the Code. The statute requires the court to allow amendments of the pleadings, and it has been long held that a petition for a rehearing may be amended.—*Dothard v. Teague*, 40 Ala. 586. The statute provides for the substitution of lost or destroyed papers in any pending cause or proceeding, and for the notice to be given to the adverse party.—Code, §§ 657, 2734. An appeal lies from an order of the court refusing to grant a statutory rehearing after final judgment at law.—*O'Neal v. Kelly*, 72 Ala. 559; 40 Ala. 586.

It might give certain facts set up in the petition and proposed amendments undue weight, if they were specifically pointed out and discussed in this opinion. The ruling of the trial court was not in accord with the principles herein

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declared. The court should allow all proper amendments to the petition, pass upon all demurrers, if any, which raise the question of the sufficiency of the petition, or have the issue of fact tried and determined as it may direct, under section 2876 of the Code.

Reversed and remanded.

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Statutory Action in nature of Ejectment.

1. *Secondary evidence of recorded deed.*—When a party claims remotely under a deed of which he is not the legal custodian, and which has never been in his possession or custody, he is excused from producing it on notice, and may adduce secondary evidence of its contents; and this may be done by producing either the original record book in which it was recorded, or a certified copy of the record.

2. *Defective acknowledgment of deed as attestation.*—A defective certificate of acknowledgment, appended to a deed, may operate as the attestation of a witness; the officer who made it may testify to his own signature, and to the fact that the deed was executed in his presence; and the deed is admissible as evidence on that proof.

3. *Power of sale in deed of trust; request of beneficiaries, or either of them.*—When a deed of trust is executed for the protection and indemnity of two sureties, and authorizes the trustee to sell and "pay whatever may be necessary to indemnify them or either of them," he may sell at the request of one, who alone has been damnified.

4. *Possession of trustee making sale under power.*—When a deed of trust authorizes the trustee to take possession and sell on default, but does not require that he shall enter before making a sale, he may sell without taking possession, and it is not necessary that his deed to the purchaser shall show that he was in possession.

5. *Recitals of deed as to date of sale.*—It is not necessary that the trustee's deed to the purchaser at his sale should specify the day on which it was made, but it may state that the sale was made "on or about" a named day.

6. *Description or identification of trustee as grantor in deed.*—It is not necessary that the name of the trustee shall be stated in the deed as the grantor, when its recitals and his signature to it clearly identify him as the grantor.

7. *Sale under power for cash, or on credit.*—When the deed authorizes the trustee to sell for cash, and he sells on time, with the acquiescence of the beneficiary, who receives the benefit of the bid, a third person can not assail the purchaser's title because the sale was not made for cash.

8. *Delay in execution of deed to purchaser.*—When the purchaser sues to recover the possession of the land, and the trustee's deed to him shows that it was executed twelve years after the sale, it is not incumbent on him to explain the delay in its execution, as against the

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defendant who was not a party to the sale, and who does not show any right to impeach it for fraud.

9. *Conveyance to third person as purchaser, at instance of bidder at sale.*—A stranger to the sale can not assail its validity because the trustee executed a deed, not to the nominal bidder and purchaser, but to a third person at his instance.

10. *Judgment and execution as evidence.*—Where the plaintiff claims as purchaser at a sale made by a trustee under a power conferred by deed of trust for the indemnity of sureties on specified debts, the record of a judgment recovered on one of these debts, and executions thereon showing its payment by one of the sureties, are admissible evidence as tending to show the authority of the trustee to make the sale.

11. *Issue on immaterial or defective plea.*—When issue is joined, without objection, on an immaterial or defective plea, the defendant is entitled to adduce evidence in support of it, and is entitled to verdict and judgment if the evidence sustains it, the plaintiff's remedy being to ask for a repleader.

12. *Plea of statute of frauds; burden of proof.*—When issue is joined on a plea of the statute of frauds, in an action on a contract within its terms (Code, § 1732), the plaintiff assumes the *onus* of proving a compliance with its terms, or that the contract was taken out of the statute by part performance.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. SAM. H. SPROTT.

This action was brought by Edward J. Hagler against John W. Jones, to recover the possession of a tract of land particularly described in the complaint, and was commenced on the 20th July, 1888. The plaintiff claimed the land as purchaser at a sale made by Moses McGuire, as trustee in a deed of trust executed to him by David G. Jones, who was the father of the defendant. This deed was dated August 2d, 1858, and was given to secure John W. Pruitt and John H. Spain against liability as sureties for the grantor on certain debts particularly described; and it authorized the trustee, on default of the grantor in the matter of the secured debts, "to take possession of said land and slaves, or so much of them as may be necessary for the purpose, and sell them at public auction, for cash, at the door of the court-house of the county, on giving ten days notice, and pay off any of the bills indorsed by them, and pay all and whatever may be necessary to indemnify said John W. and John H., or either of them, and save them harmless in the premises." The defendant pleaded, 1st, the statute of limitations of ten years; 2d, "payment of the secured debt, or performance of the condition of the deed of trust;" 3d and 4th, that said Moses McGuire was *non compos mentis* at the time he executed the deed to plaintiff; 5th, not guilty; 6th, that the deed or contract of McGuire was void under the statute of frauds (Code, § 1732), because no note or mem-

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orandum thereof, expressing the consideration, was made at the time of the sale, and subscribed by the party to be charged; and, 7th, that the contract was void under said statute, because no part of the purchase-money was paid at the time, and the purchaser was not placed in possession. Issue was joined on all of these pleas without objection.

On the trial, as the bill of exceptions shows, the plaintiff offered the deed of trust in evidence, and the court admitted it against the objection and exception of the defendant, on grounds specified in the opinion. The plaintiff offered in evidence, also, the deed executed to him by said McGuire as trustee, and the court admitted it against the numerous objections of the defendant. This deed was dated March 2d, 1878, and signed by Moses McGuire as trustee; and it contained these recitals: "*Whereas*, on the 2d August, 1858, David G. Jones executed to me as trustee, for the benefit of John W. Pruitt *et al.*, a deed of trust to the following lands," describing them; "*and whereas*, at the request of said John W. Pruitt, the undersigned did, after giving the notice required by said deed, on or about the 1st December, 1866, expose to sale to the highest bidder for cash, at the court-house in said county, the land above mentioned; and *whereas*, at said sale, Edward J. Hagler became the purchaser at the price of \$600; and *whereas*, said Hagler arranged the payment of the sum bid with said John W. Pruitt, the beneficiary in said deed: Now, therefore," &c. in the usual form of a deed for land. There was no subscribing witness to this deed, nor any certificate of acknowledgment, but appended to it was a certificate by a justice of the peace, in these words: "I, J. W. Bagnall, acting justice of the peace in and for said county, hereby certify that the above named person signed this conveyance; same bears date this 2d March, 1878." In connection with the deed, the plaintiff introduced said Bagnall as a witness, who thus testified: "Moses McGuire signed said deed in my presence, and I thereupon wrote and signed the statement set forth." The defendant objected to the testimony of said Bagnall, and also to the admission of the deed as evidence, "because it was not acknowledged or attested as by law provided;" and he excepted to the overruling of these objections.

The defendant made the following additional objections to the admission of the deed as evidence: (1.) Because John W. Pruitt and John H. Spain "were joint beneficiaries under said deed of trust, while the deed of McGuire to Hagler showed that the sale under it was made at the re-

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quest of only one of them." (2.) Because the deed of trust provided that the trustee should take possession of the property before selling, and it was not shown, nor could it be shown, that the trustee was in possession, actual or constructive, at the time the sale was alleged to have been made. (3.) Because the deed states that the sale was made "on or about the 1st December, 1866," and not on the particular day set for the sale. (4.) Because "the name of the grantor is not mentioned in the body of the deed as conveying in the capacity of trustee or otherwise." (5.) Because the deed showed that the purchase-money was not paid in cash, as required by the terms of the deed of trust. (6.) Because the delay in the execution of the deed "was such a badge of fraud that it devolved on the plaintiff to explain it before said deed could be introduced." (7.) Because it was not made to the purchaser at the sale. The court overruled each of these objections as made, and the defendant duly excepted. The plaintiff offered in evidence, also, the record of a judgment recovered against said J. W. Pruitt in September, 1861, on one of the debts secured by the deed of trust, and execution thereon, with indorsements showing its payment by Pruitt. The defendant objected to the admission of this evidence, but specified no particular ground of objection, and he excepted to its admission.

The assignments of error embrace all the rulings to which exceptions were reserved.

WOOD & WOOD, and J. J. MAYFIELD, for appellant.

FOSTER & OLIVER, *contra*.

WALKER, J.—The plaintiff claimed title through a sale and conveyance made by Moses McGuire, as the trustee in a deed of trust in which David G. Jones was the grantor. To prove the deed of trust, the plaintiff offered the original record thereof as contained in one of the record books of deeds kept in the office of the probate judge of Tuskaloosa county. Objection was made to this evidence, on the grounds that the defendant had made demand on the plaintiff to produce the original of said deed of trust, and that a certified copy should have been offered instead of the original record. The plaintiff testified, without contradiction, that the original of the deed of trust had never been in his possession or custody, or under his control. He was not the legal custodian of the instrument. That being the case, it was not incumbent upon him to produce it, or to account

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for its absence. The instrument could as well be proved by the original record as by a certified copy therefrom. *Stevenson v. Moody*, 85 Ala. 33; *Miller v. Boykin*, 70 Ala. 469. The objection to this evidence was properly overruled.

The several grounds of objection to the admission in evidence of the deed by Moses McGuire as trustee to the plaintiff will be considered in detail.

(1.) The plaintiff did not claim that the statement written upon the deed and signed by the justice of the peace was sufficient as a certificate of acknowledgment. It was relied upon as an attestation, and the justice of the peace was called as a witness to prove the deed. The statement certifies "that the above named person signed this conveyance." This language fairly imports that the justice of the peace had knowledge of the fact to which he certifies,—that he was a witness to the signing. The execution of a conveyance for the alienation of land, when made by a person who is able to write, must be acknowledged, or attested by one witness, who must write his name as a witness.—Code of 1886, § 1789. A proper attestation may be made by the mere signature of the witness. It is sufficient that the signature appears to be made for the purpose of attesting the execution of the conveyance. It has been decided that a defective acknowledgment may operate as a substitute for the attestation of a witness, and in such case the officer is treated as an attesting witness.—*Rogers v. Adams*, 56 Ala. 600; *Sharpe v. Orme*, 61 Ala. 263; *Carlisle v. Carlisle*, 78 Ala. 544. The signature of the justice of the peace to the statement above referred to was sufficient as an attestation, and there was no error in overruling the objection to the introduction of the deed on the ground that it was not properly attested.

(2.) Objection was made to the introduction of the deed to the plaintiff, on the ground that it was shown and provided by the deed of trust that John W. Pruitt and John H. Spain were joint beneficiaries thereunder, and that the deed to the plaintiff shows that the sale under the deed of trust was made at the request of only one of the beneficiaries. By the power of sale contained in the deed of trust the trustee is authorized to sell in the mode prescribed, and to "pay off any of the bills indorsed by them [Pruitt and Spain], and pay all and whatever may be necessary to indemnify said John W. and John H., or either of them, and save them harmless in the premises." This language authorizes the execution of the power of sale for the indemnification of either Pruitt or Spain, for any loss sustained in conse-

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quence of any indorsement made in pursuance of the provisions of the deed of trust. There is no provision that one or both of the beneficiaries shall request the trustee to execute the power of sale. If Pruitt alone had sustained losses in consequence of the indorsements mentioned in the deed of trust, the power of sale could be executed for his benefit alone. The recitals of the deed to the plaintiff do not show a disregard of the terms of the power in the particular specified in the objection.

(3.) Taking possession of the land by the trustee was not, by the terms of the deed of trust, made a condition precedent to the exercise of the power of sale. The trustee was authorized, but not required, to take possession of the land before making a sale thereof.—2 Jones on Mortgages, § 1782; *Vaughan v. Powell*, 4 So. Rep. 257; *Riley v. Brewster*, 44 Ill. 186. The terms of the instrument which was construed in the case of *Foster v. Boston*, 133 Mass. 143, indicated that the execution of the power in the mode provided made it necessary for the trustee to acquire possession of the property before making a sale. In such a case, possession by the trustee is properly regarded as a condition precedent. It does not seem that such a condition could be satisfied by a mere demand for possession, as was intimated in the case of *Roarty v. Mitchell*, 7 Gray, 243.

(4.) The deed to the plaintiff recites that the grantor therein, "after giving the notice required by said deed of trust, did, on or about the first day of December, 1866, at the court-house in said county, expose to sale," &c. If a sale had been made pursuant to the terms of the power, it was not material for the trustee to recite in his deed the exact date of such sale. After the sale was duly made he could with propriety execute a deed to the purchaser, though he was unable to state therein the exact date of the sale. If the defendant was entitled to require the plaintiff to prove a compliance with the provisions of the power, as to the notice of the time and place of sale, on the ground that the recitals in that regard of the deed made by the trustee were not binding on a stranger (*Wood v. Lake*, 62 Ala. 489; 1 Devlin on Deeds, § 425; 2 Jones on Mortgages, §§ 1830 and 1895); the consideration that the burden was on the plaintiff to make such additional proof would not justify the rejection of his deed as a link in his chain of proof.

(5.) The name of the trustee is not mentioned in the body of his deed; but the recitals thereof furnish the means of clearly identifying *Moses McGuire* as the grantor. The deed recites: "Whereas, on the second day of August, 1858,

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David G. Jones executed to me as trustee, for the benefit of John W. Pruitt *et al.*, a deed of trust to the following described lands, to wit:" [here follows a description of the land], "which deed is recorded in Book 5, page 138, of the records of deeds in the office of the judge of probate of Tuscaloosa county, Alabama." An inspection of the deed of trust, which is thus fully described, discloses that Moses McGuire is the trustee therein, and makes it manifest that he is the grantor in the deed to the plaintiff. This is a sufficient description and identification of the grantor. *Madden v. Floyd*, 69 Ala. 221.

(6.) The power in the deed of trust authorized the trustee to sell for cash. The payment of the plaintiff's bid was a matter between him and the beneficiary of the sale, and with which the defendant in this case had no concern. By the arrangement recited in the deed to plaintiff, the grantor in the deed of trust obtained the credit and benefit of the amount bid. When this was done, neither he nor any other person who was not a beneficiary under the deed of trust could complain because the payment was not made in cash. *Mewburn v. Bass*, 82 Ala. 622; *Cooper v. Hornsby*, 71 Ala. 62.

(7.) It was not incumbent upon the plaintiff, in offering the deed to himself, to explain the delay in its execution. The execution of the deed by the trustee in 1878 shows upon its face his recognition of the sale made by him in 1866, and that the purchaser at that sale had all along been entitled to a conveyance of the land sold. The defendant was not a party to that sale, and, in making the objection that the delay was a badge of fraud, he did not suggest any fact to show that he had any interest in the matter which would entitle him to complain of the delay.—*Broughton v. Atchison*, 52 Ala. 62. None of the grounds of objection to the introduction of the deed to the plaintiff were well taken.

There was evidence tending to show that, at the sale under the power, John W. Pruitt, one of the beneficiaries under the deed of trust, bid off the lands, and afterwards directed the deed to be made to the plaintiff. It often happens that one who bids at an auction sale is acting for another person, or transfers his bid to another. In the absence of fraud, there is no objection to such a transaction. If the ostensible purchaser directs the deed to be made to another, a stranger to the sale can not complain that the real purchaser did not make his bid in person.—2 Jones on Mortgages, § 1896. The motion to exclude the deed, because it was not made to the purchaser at the sale by the trustee, was properly overruled.

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The record of the judgment and executions, with the returns therein, in the case of *R. K. Hargrove v. John W. Pruitt*, was admissible as evidence tending to show a breach of the condition of the deed of trust, and that Pruitt was entitled to the execution of the power of sale for his indemnity, to the extent of the amount realized in proceedings against him on one of the bills of exchange which he indorsed for David G. Jones, as was recited in the deed of trust.

The plaintiff did not demur to any of the seven pleas interposed by the defendant, but joined issue on all of them. The question of the sufficiency of the 6th and 7th pleas as answers to the complaint was not raised in any manner. By joining issue upon them, the plaintiff admitted that each of them stated a defense which, if sustained by the evidence, would defeat the action. A case must be tried on the issues developed by the pleadings. If a false issue is made up, in consequence of a neglect to resort to the means provided by law for its elimination, the question thereby presented is one of fact for the determination of the jury, and if the proof sustains such issue, the party setting it up is entitled to a verdict and judgment on it.—*Geo. Pac. Railway Co. v. Probst*, 90 Ala. 1; *Allison v. Little*, 93 Ala. 150; *Masterson v. Gibson*, 56 Ala. 56. The 6th and 7th pleas are pleas of the statute of frauds. In joining issue thereon, the plaintiff assumed the burden of showing facts which would avoid the effect of the pleas. He put himself in the attitude of affirming that, at the time of the sale by Moses McGuire to him, 'a note or memorandum thereof was made, expressing the consideration in writing, and subscribed by the party to be charged therewith or some person thereto by him lawfully authorized in writing; or that the purchase-money or some part thereof was paid, and that the purchaser was put in possession of the land by the seller.—*Jonas v. Field*, 83 Ala. 445. The provisions of the statute of frauds which were referred to in the pleas were applicable to the sale made by McGuire. The objection that the benefit of these provisions was not available to the defendant (*Lewis v. Wells*, 50 Ala. 198; *Cooper v. Hornsby*, 71 Ala. 62; *Mewburn v. Bass*, 82 Ala. 622), could have been raised by demurrers or replications to the pleas. No such objection having been interposed, and the plaintiff having failed to offer any proof that in the sale by McGuire there was a compliance with the statutory requirements referred to in the pleas, he failed to sustain the burden assumed by his joinder of issue thereon; and the result was that, on these issues, the

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defendant was entitled to a verdict and judgment. The general charge requested by the defendant should have been given. On the remandment of the cause, the plaintiff may move in the court below for a repleader, as to pleas presenting false or immaterial issues.—*Geo. Pac. Railway Co. v. Probst*, 90 Ala. 1; *Mudge v. Treat*, 57 Ala. 1.

In the foregoing opinion we have considered such questions presented by the rulings of the Circuit Court on the admission and rejection of evidence as are likely to arise on another trial.

Reversed and remanded.

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Bill in Equity for Cancellation of Deed.

1. *Verbal promise to make will, as consideration of deed.*—A verbal promise to make a will devising land to the promisee, in consideration of his present conveyance of the land to the promisor, is void under the statute of frauds (Code, §§ 1732, 1845), and a court of equity will not grant relief based on it.

2. *Part performance avoiding statute of frauds.*—If the purchaser of land, under a verbal contract, is placed in possession, and pays the purchase-money, or a part thereof, the contract is taken out of the statute of frauds (Code, § 1732); but the two facts must concur, and a court of equity can not extend the terms of the statute by dispensing with either. (*Rakes v. Pope*, 7 Ala. 161, limited to sales of personal property.)

3. *Fraudulent promise to make will.*—If a person procures the execution of a conveyance of land by promising to devise the land by will to the grantor, having at the time the intention not to do so, and afterwards dies intestate, the fraud will vitiate the transaction, and a court of equity will grant relief against the conveyance; but the fraud must be established by clear and convincing evidence, and relief must be sought seasonably after the discovery of the fraud; and the subsequent breach of the promise, by failing and refusing to execute such will, is not, of itself, conclusive or sufficient evidence that the promise was made with a fraudulent intent.

4. *Same; allegations as to discovery of fraud.*—The bill being filed by the husband, against the heirs at law of his deceased wife, seeking relief against a conveyance of land, which he had executed to her, as alleged, in consideration of her fraudulent promise to devise it to him by will, and alleging that "the fact that it was her intention at the time not to comply with her said promise, and that she was employing a mere stratagem, and the evidence of such intention, did not become known to your orator until he filed his original bill in this cause, though he made repeated and diligent inquiry in reference thereto;" these averments do not meet the strict requirements of the rule applicable in such cases, because they do not show how the fraud was discovered, nor why it was not discovered sooner.

96	537
96	511
96	537
96	396
96	526
96	537
102	448
96	537
128	616
96	537
131	637
96	537
96	637
138	517

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5. *Same; laches*.—The lapse of sixteen years after the alleged promise was made, during which period the wife repeatedly refused to execute her will as promised, bars any right to relief against her heirs after her death, even if the averments of the bill were fully and precisely proved.

APPEAL from the Chancery Court of Pickens.

Heard before the Hon. WM. H. TAYLOR.

The facts of this case are fully stated in the opinion of the court, and in the former report (86 Ala. 357-64), and no further statement is necessary. On final hearing, on pleadings and proof, the chancellor dismissed the bill: and his decree is assigned as error.

WATTS & SON, and M. L. STANSEL, for appellant.—(1.) The promise to make a will is clearly proved. That promise was a valuable consideration, and proof of it was admissible notwithstanding the recitals of the deed.—*Manning v. Pippen*, 86 Ala. 357. (2.) A promise to do a thing by will is not within the statute of frauds.—*Bish. Contracts*, § 1279; *Jilson v. Gilbert*, 26 Wisc. 637. But, if the promise was within the statute, the contract having been fully executed by plaintiff, the defendants can not take advantage of it. When everything is done under a verbal contract for the sale of land, except the payment of the purchase-money, the purchaser can not set up the statute of frauds in avoidance of the contract, or to avoid the payment of the purchase-money. To permit this would allow him to commit a fraud on the seller, which a court of equity will not sanction. *Pope v. Rake's Adm'r*, 7 Ala. 161; *Gordon v. Tweedy*, 71 Ala. 202; *Galley v. Galley*, 14 Nebr. 174; *Browne on Stat. Frauds*, § 116, notes; *Bishop on Contracts*, § 634. (3.) The promise to make a will can not be specifically enforced, of course, but the court can cancel the deed, or decree compensation, and charge it as a lien on the land.

E. D. WILLETT, and J. C. JOHNSTON, *contra*.—(1.) The bill seeks to enforce a parol trust in lands, which is void under the statute.—*Code*, § 1845; *Patton v. Beecher*, 62 Ala. 593; *Brock v. Brock*, 90 Ala. 86; *White v. Farley*, 81 Ala. 567. (2.) The deed recites a valuable consideration, and its recitals can not be varied by parol proof in the absence of fraud or mistake.—*Hubbard v. Allen*, 59 Ala. 296; *Murphy v. Branch Bank*, 16 Ala. 90; *Patton v. Beecher*, 62 Ala. 588; *Brock v. Brock*, 90 Ala. 86. (3.) There is a total absence of proof of fraud in the procurement and execution of the deed, and subsequent fraud, if proved, which is denied, would not

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invalidate it. (4.) The terms of the alleged promise, as proved by the different witnesses, are uncertain and contradictory. (5.) The evidence shows that the deed was executed by the grantor in fraud of his creditors, and he can have no relief against it, nor based on it.

THORINGTON, J.—The bill in this cause was filed by appellant against the appellees, as the heirs at law of their mother, Mrs. Mattie E. Manning, and seeks relief from the effects of a deed executed by appellant to the mother of appellees under the following circumstances:

In 1868, appellant, who was without children, intermarried with Mattie C. Atkinson, a widow with two minor children, John and Minnie F. Atkinson, and during that year conveyed to Jephtha Sterling, as trustee for his wife, a certain tract of land then owned by him, containing about twelve hundred acres. The consideration recited in the deed is, that the grantor was justly indebted to his wife "in the sum of two thousand dollars principal, for that amount of money and property received by the said David Manning from the estate of the father of said Martha, which money and property belonged to, and were and are, the separate statutory estate of the said Martha under the Code of Alabama, and which money and property said David Manning, the husband of said Martha, appropriated and converted to his own use. In payment and discharge of said sum, he, the said David Manning, has bargained, sold and conveyed," &c. The deed further recites that it conveys the property to Jephtha Sterling, in trust for "the sole and separate use, benefit and behoof of the said Martha J. Manning, free from any claim or claims whatsoever of him, the said David Manning, or his assigns; and the said Martha, wife aforesaid, becomes and is a party to this deed, and as evidence that she accepts the property hereby and herein conveyed in full satisfaction and discharge of her said debt against the said David Manning, husband aforesaid."

The appellant claims that, notwithstanding the recitals contained in the deed of a valuable consideration, of the character therein specified, he executed the deed as the result of his wife's urgent importunities, and upon her promise that she would thereupon execute her will by which she would bequeath and devise to him one-third of all her property, including one-third of said lands, and the remaining two-thirds to her two children, Minnie and John; and that the real and moving consideration of the deed was this promise on the part of his wife.

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The deed was made in 1871, and Mrs. Manning died in 1884, without ever having executed a will. She left surviving her, as her heirs at law, the appellee, Minnie F. Pippen, and the other appellees, who are the children of John Atkinson, he having died before the bill was filed. Appellant, at various times after the execution and delivery of said deed, requested his wife to execute her will pursuant to her said promise, but she declined to do so. After her death, appellees instituted a real action in the nature of ejectment against appellant, who continued in possession of the land after his wife's death; and this suit was enjoined under the bill in this cause. Demurrers to the bill were sustained in the Chancery Court, and the cause was brought to this court by appeal, and was here reversed and remanded. The case is reported in 86 Ala. 357.

In the consideration given the cause by this court on that appeal, it was assumed, on demurrer, that the promise of Mrs. Manning to execute her will as alleged in the bill was in writing. After the reversal of the cause in this court, the defendants filed additional demurrers and answers, which last denied the material allegations of the bill, and among the other defenses setting up specially the statute of frauds. Testimony was taken, and the cause submitted on the pleadings and proof for final decree. The chancellor rendered a decree denying relief to complainant, and dismissing his bill; and from that decree appellant appeals to this court.

The bill and the amendments treat in two different aspects the promise of Mrs. Manning to revest the title to the property in appellant by her will: *first*, as a mere promise to will the property back to appellant in consideration of the deed, and a breach of that promise, after condition performed by appellant; *second*, that the promise was a mere artifice on Mrs. Manning's part, resorted to by her to procure the execution of the deed by her husband, with the fraudulent intent not to comply with her promise, and by means whereof she did procure the execution of the deed, and afterwards refused to comply with her promise, until her death rendered such compliance impossible.

We decline consideration of the question urged by counsel for appellees, whether the bill and amendments present two inconsistent and repugnant grounds for relief, or, in other words, whether the amendment is a departure from the original bill, and makes a new case, for the reason that the conclusion we have reached on the merits of the case renders that question immaterial.

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Section 1845 of the Code of 1886 declares: "No trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law, can be created, except by instrument in writing, signed by the party creating or declaring the same, or his agent or attorney lawfully authorized thereunto in writing." This section is identical with section 2199 of the Code of 1876, which was elaborately considered by this court in the case of *Patton v. Beecher*, 62 Ala. 579; and the principle announced in that case has frequently been recognized, and expressly re-affirmed by subsequent decisions of this court. That decision, among other things, clearly affirms that the mere parol promise by the grantee in a deed, or a devisee in a will, that he will hold for the use of, and reconvey to the grantor or devisor, on request, or on a specified contingency, is a trust which the statute requires to be created or declared in writing. That such a promise would be inoperative under the statute of frauds, is too well settled now to be questioned.

In 2 Pom. Eq. Juris. § 1054, it is said: "There are a few cases which seem to hold that a trust will arise, under these circumstances, from a *mere verbal promise* of the devisee or legatee to hold the property for the benefit of another person. This position, however, is clearly opposed to settled principle." The case of *Barrell v. Hanrick*, 42 Ala. 60, was one of the few cases of this class referred to by the above named author; but the doctrine it asserted was expressly repudiated by this court in *Patton v. Beecher*, *supra*, and the case has ceased to be of authority in this State on the question under consideration.—*Patton v. Beecher*, *supra*; *Manning v. Pippen*, 86 Ala. 357; *Brock v. Brock*, 90 Ala. 86.

To meet the plea of the statute of frauds, appellant invokes the principle, as stated in brief of counsel, that "When everything is done under a verbal contract for the sale of lands, except the payment of money, the purchaser can not set up the statute of frauds to avoid the purchase, or to avoid the payment of the purchase-money;" and in support thereof the case of *Rukes v. Pope*, 7 Ala. 161, and decisions of other States to the same effect, are cited.

The doctrine here invoked by appellant's counsel is applicable to sales of goods or chattels under a verbal promise not to be performed within one year, and where the property has been delivered under the promise; and it may also have application to sales of land in jurisdictions where there is no statute, such as in this State, prescribing in specific terms what shall constitute such a part performance

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of the verbal contract as will take the case without the operation of the statute of frauds.

The decision in the case of *Rakes v. Pope*, cited by appellant's counsel, is predicated upon the sale of a horse in October, 1837, upon the promise of the buyer to pay the seller \$1,000 on December 25, 1837, \$2,000 on December 25, 1838, and \$2,000 on December 25, 1839. The contract was verbal, no note or memorandum being made and signed. The horse was delivered at the time of the sale, and an action being brought by the owner to recover an installment of the purchase-money, which, by the terms of the contract, was not to be paid within twelve months from the sale, this court, reversing the ruling of the court below, held that the delivery of the horse by the seller relieved the case from the influence of the statute. There is nothing in this case, or in the other cases cited by counsel, that furnishes a rule of decision for the case at bar. Indeed, to extend this principle to verbal sales of lands, would be in direct contravention of the statute of this State, which declares void "every contract for the sale of lands, tenements or hereditaments, or of any interest therein, except leases for a term not longer than one year, *unless the purchase-money or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller.*"—Code, 1886, § 1732, subd. 5.

The words above italicized create the exception of the only parol contract for the lease or sale of lands which can be withdrawn from the general words of the statute; and in order to bring a case within the exception, two facts must concur—the payment of the purchase-money, or a part thereof, and the placing of the purchaser in possession; and these two facts must be in pursuance of the contract. Neither the possession without payment of the whole or a part of the purchase-money, nor the payment of the purchase-money or part thereof without the letting into possession, will meet the requirements of the statute.—*Heflin v. Milton*, 69 Ala. 354.

We proceed now to consider that phase of the case presented by the amendment to the bill, in which it is set up as a distinct ground of relief that the execution and delivery of the deed by appellant to his wife was procured by her artifice and deception; that she induced appellant to make the deed to her by promising to make her will, at once, bequeathing to him one-third of all her property, including one-third of the lands conveyed to her by the deed, which promise she, at the time of making it, had no intention of

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performing. This aspect of the case depends on different principles from those we have discussed.

It may be said generally, that whenever the legal title to property, real or personal, is obtained under circumstances amounting to actual fraud, or which render it unconscionable for the holder of the legal title to retain the beneficial interest, equity impresses a constructive trust on the property so acquired, in favor of the one who has been thus deprived of his property, and who is truly and equitably entitled to the same. In such cases, equity has jurisdiction to follow the property in the hands of the original wrong-doer, or in the hands of any subsequent holder, except a purchaser who has acquired it in good faith and without notice. Equity fixes upon such wrong-doer the character or *status* of a trustee *ex maleficio*, or *ex delicto*, and he may be held liable as such whenever necessary for obtaining complete justice, notwithstanding the law may also give a remedy in damages against him.

In 2 Pom. Eq. Juris. § 1055, that author says: "A second well settled and even common form of trusts *ex maleficio* occurs, wherever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specific purpose—as, for example, a promise to convey the land to a designated individual, or to reconvey it to the grantor, and the like—and having thus fraudulently obtained the title, he retains, uses and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained, is in fact a scheme of actual deceit. Equity regards such a person as holding the property charged with a constructive trust, and will compel him to fulfill the trust by conveying according to his engagement." And in section 1056 of the same work it is said: "The foregoing cases should be carefully distinguished from those in which there is a mere verbal promise to purchase and convey land. In order that the doctrine of trusts *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be abrogated. There must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated." The doctrine of the text is fully supported by the decisions of this court.—*Patton v. Beecher*, 62 Ala. 579; *White v. Farley*, 81 Ala. 563; *Manning v. Pippen*, 86 Ala. 357; *Brock v. Brock*, 90 Ala. 86.

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Applying the principles above announced to the facts of this case, we must hold that appellant is not entitled to any relief based on the mere verbal promise of Mrs. Manning; that such promise is void under the statute of frauds, and that it has not been executed within the meaning of the exception to the statute.

Whether or not relief can be afforded upon the other theory of the case—viz., that which imputes to Mrs. Manning the fraudulent purpose of procuring from her husband the execution of the deed by means of her verbal promise to will one-third of the property back to him, which promise she had no intention, at the time of making it, to perform—requires a careful review of the pleadings and testimony; and the inquiry must be pursued subject to the universally accepted rule, that a parol trust will not be engrafted on a legal title, evidenced by an instrument of conveyance absolute on its face, except with the greatest caution, and where the fraud necessary to give rise to the trust is established by clear and convincing proof; and, it may be added, when relief is seasonably sought after discovery of the fraud.

In *James v. James*, 55 Ala. 534, it was said by this court: "But by no mere general averment of ignorance can a party account for long delay and acquiescence. By distinct averments he must show why he was so long ignorant, and acquit himself of all knowledge of facts which would put him on inquiry. He must show how and when he first came to a knowledge of the facts, or the court may justly refuse to consider his cause on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

The averment in the bill is, that "the said Mattie C., at the time she made said promise, well knew it was not her intention to make such will, but she resorted to this promise as artifice to induce your orator to make said deed, with no intention of complying therewith; and the fact that it was her intention at the time not to comply with her said promise to make such will, and that she was employing a mere stratagem, and the evidence of such intention, did not become known to your orator until he filed his original bill in this cause, though he made repeated and diligent inquiry in reference thereto, never suspecting fraud."

These averments of the bill do not meet the strict requirements of the rule—they fail to show how the discovery of the alleged deception was made; and for this reason, the court has no means of determining that such discovery might not have been made sooner.

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The bill in this case was not filed until about nineteen years after the execution of the deed. Mrs. Manning lived about sixteen years after the transaction, and the proof shows that during her life-time appellant often requested her to execute her will according to her promise, and that she invariably refused to do so. There is absolutely nothing in the testimony to show that appellant discovered any fact or facts bearing upon or illustrating Mrs. Manning's original design in making the promise, of which he was not informed, or might not have been informed, shortly after he made the deed. In this respect, the case is presented differently now from what it was on the former appeal. *Then*, the bill contained no averment of the time when, according to the promise of Mrs. Manning, she was to execute her will in favor of appellant, and, in the absence of such an averment, this court held she had her life-time in which to do so, and that there was no actionable breach of her promise until she died without having complied with the promise. *Now*, the allegation in the bill, as amended, is, that the deed was made on the promise of Mrs. Manning that she would, in consideration of the deed, "*at once* make and execute her said will," &c.

According to the testimony, appellant, in a very short time after he made the deed, from time to time, requested his wife to execute her will pursuant to her promise, and she uniformly declined to do so. If, as claimed by the appellant, the promise was made by the wife as a mere artifice, or fraudulent scheme, to procure the deed, and without any intention of executing the will, and that the refusal of the wife to comply is evidence of her original purpose to practice fraud upon the husband; then appellant was as fully informed of such fraud on her part by her first refusal to execute the will, as he was at the end of the nineteen years when he brought his suit; for, after a careful examination of the testimony, we find nothing tending to support this claim of appellant, except the mere refusal of Mrs. Manning to comply with her promise. At all events, there is no fact or circumstance touching that subject of which appellant was not informed, or might not have known, shortly after making the deed. So far as the testimony shows to the contrary, and according to the averments of the amendment to his bill that the will was to be executed at once, the court is unable to perceive why this bill might not have been filed many years ago, while Mrs. Manning was in life, and when all the circumstances were fresh in the minds of the witnesses.

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We are not to be understood, however, as intimating that the mere subsequent refusal of Mrs. Manning to comply with her promise would, of itself, furnish sufficient evidence of a formed purpose or design on her part, at the time of the execution of the deed by her husband, to employ the promise as a stratagem by which she should secure the deed with no intention of complying with the promise. The law is to the contrary. It is clear, under the authorities, that the mere breach of a verbal promise of this kind, standing alone, although it may be a moral wrong, is not sufficient to establish that fraud in procuring the title which would render the grantee, or devisee, a trustee *ex malificio*. "The true rule seems to be, that there must have been an original misrepresentation, by means of which the legal title was obtained; and an original intention to circumvent, and get a better bargain, by the confidence reposed."—Browne on Stat. of Frauds, (3d ed.) § 94. Such breach is a circumstance to be considered in connection with the other facts of the case going to prove fraud; but, standing alone, it can not be regarded as conclusive of the existence of evil or fraudulent intent at the time of the promise.—*Brock v. Brock*, 90 Ala. 86.

While there is an absence of proof, other than the mere subsequent breach by Mrs. Manning of her promise, to show that, at the time of making the promise, she did not intend to fulfill it, there is some testimony which, while not conclusive of that question, tends to show that it was her intention at that time to perform such promise. The witness Boone, who was the officer before whom the deed was signed and acknowledged, swears that on the day the deed was signed, and immediately thereafter, Mrs. Manning followed witness to the entry, or door of the house where the signing occurred, and, after explaining to him the object of the deed, she requested him to write her will, which he consented to do at any time. There were several other persons present, but this was said to witness apart from the others, without any effort to attract their attention thereto, and, so far as appears to the contrary, the request was but the expression of her real desire or purpose, and not a cunning attempt to manufacture testimony for herself. Furthermore, giving full weight to all the testimony, it is far from clear that appellant made the deed relying solely on the promise of Mrs. Manning as an inducement thereto; there is testimony of strong probative force that the deed was not made on the faith of the promise, but on other consid-
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erations, and that the promise was only an incident to the main transaction.

The solemn recitals in the deed of a valuable consideration, [the particularity with which such consideration is described, as shown by the statement of facts hereinabove set forth, the acknowledgment required in the deed of Mrs. Manning that the conveyance was accepted by her in full satisfaction of the debt described in the deed, the facts in proof showing that appellant had previously received from the estate of Mrs. Manning's father, as her share of such estate, a sum of money which approximated, if it did not equal, the amount expressed as the consideration of the deed, and the further fact, as also shown by the proof, that appellant owed debts, at the time of making the deed, one of which, at least, was in judgment, present an array of concurring facts and circumstances which render it equally, if not more probable, that the deed was based on other considerations, and not on the faith of Mrs. Manning's promise. We do not overlook the fact that appellant himself testifies, that he turned over to his wife the money he received from her father's estate; but this part of his testimony was objected to, and the objection was well taken. Section 2765 of the Code rendered him incompetent to testify to that fact, and appellant made no effort to prove it otherwise.

"It is a general, if not universal rule, that a plaintiff in an action at law, or a complainant in a suit in equity, assumes the burden of proving every affirmative fact essential to his right of recovery. No material fact is presumed; and the rule is general, in courts of law and in equity, that a party relying upon fraud, must aver it with certainty, and must prove it as averred."—*Thames v. Rembert's Adm'r*, 62 Ala. 567. It can not be affirmed of this case that appellant has brought himself within the scope of the rule, either in the matter of averment or proof.

The want of correspondence between the averments of the bill and appellant's proof in still another respect is fatal to any relief the court could afford him, according to the rule laid down by this court on the former appeal. It was there held that the court of chancery being without power to compel the execution of a will, specific performance of the agreement could not be enforced, but that equity would charge the land with a trust, in the nature of unpaid purchase-money, for the indemnification of the vendor, to the extent he has suffered from the breach of Mrs. Manning's promise. The averment in the bill is that Mrs. Manning

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promised to devise to appellant one-third of all her property, including one-third of the land in controversy. The testimony of the witness Boone is that Mrs. Manning promised to devise to appellant *all* the lands conveyed by the deed, *to be held by him for life*, with remainder to Mrs. Manning's children. The witness Ide Hinton, in answer to the direct interrogatories, testifies that Mrs. Manning's promise was "to make a will in favor of appellant, giving him back the lands if he outlived her;" while in answer to the cross-interrogatories he testifies that *one-half* of the land was to be devised to appellant by Mrs. Manning, and the other half to her two children. The witness Alex. Hinton testifies that the promise was to devise *the entire land* to appellant, without any condition or limitation; and to the same effect is the testimony of some of the other witnesses. These are all witnesses examined at the instance of appellant, and their depositions were offered in evidence by him.

It is impossible for the court to determine from the testimony which of these witnesses states the terms of the agreement correctly, and consequently it can not be ascertained to what extent appellant has suffered from the alleged breach of Mrs. Manning's promise, nor what sum would afford "indemnification for the vendor." With the testimony in this plight, the court can not undertake to fix the measure of relief to be afforded appellant, even if in other respects the facts and circumstances warranted relief.

The decree of the chancellor is affirmed.

Crofford v. Vassar.

Action for Damages, on Attachment Bond.

1. *Levy of attachment for rent on property not subject to writ*—The levy of an attachment for rent on property which is not subject to it, is an abuse of the process for which the sureties on the bond are not liable.

2. *Attorney's fees as damages*.—In an action on an attachment bond, attorney's fees for defending the attachment suit may be recovered as damages, if specially claimed; but an assignment claiming "special damages in the sum of one hundred dollars, in that by said attachment he was put to the expense of employing counsel to defend said attachment suit," is scarcely sufficient without a statement of some amount paid or incurred.

3. *Actual and exemplary damages*.—In an action on an attachment bond, actual damages may be recovered under a complaint which

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negatives the existence of any statutory grounds for suing out the writ; but, to authorize a recovery of exemplary or vindictive damages, the existence of probable cause must also be negatived.

4. *Same; averments of breach.*—An averment in the complaint that "said attachment was wrongfully and vexatiously sued out, and so sued out without the existence of any of the statutory grounds for the issuance of such attachment;" or, that said attachment "was wrongfully, vexatiously and maliciously sued out, in that no statutory ground existed, either for the enforcement of any existing lien, or for the purpose of creating a lien,"—simply negatives the existence of any cause for suing out the writ.

5. *Relevancy of evidence as to actual damages and malice.*—Damages to the cotton levied on, by being allowed to remain too long in the field after the levy, may be proved and recovered as a part of the actual damages; and if exemplary damages are claimed, plaintiff may prove, as tending to show malice, the declaration of his landlord after some difficulty between them, several months before the writ was sued out, "that he intended to get everything that plaintiff made on the plantation that year for nothing."

APPEAL from the City Court of Anniston.

Tried before the Hon. B. F. CASSADY.

E. H. HANNA, for appellant.

MATTHEWS & WHITESIDE, *contra*.

STONE, C. J.—The present suit was for wrongfully and vexatiously suing out an attachment for rent.—Code of 1886, §§ 3060 *et seq.* The suit is on the attachment bond. We will first determine the pleadings and issues on which the suit was tried.

There was a demurrer to the original complaint, which was sustained to such extent that it appears to have been abandoned. An amended complaint was then filed, setting forth the substance of the attachment bond, and assigning breaches, some five in number. The fifth breach assigned was, and is, that the attachment was levied on cotton not grown on the rented premises. This assignment of breach was abandoned, and rightly so.—*City National Bank v. Jeffries*, 73 Ala. 183; *Jackson v. Smith*, 75 Ala. 97. The sureties on the attachment bond were not liable for such abuse of the process, if it were perpetrated. It was not within the purview of their bond.

The defendants demurred to the amended complaint, assigning six grounds of demurrer. The complaint was then amended a second time, and the court overruled the first four grounds of demurrer, and sustained the fifth. We need not consider the sixth ground, for the plaintiff, as we have seen, struck out the assignment of breach against which that was leveled.

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The plaintiff sought to recover damages for attorney's fees incurred and expended in defending the attachment suit. The assignment of breach in reference to this claim is in the following language: "Plaintiff claims special damages in the sum of one hundred dollars, in that by the said attachment he was put to the expense of employing counsel to defend said attachment suit." This was demurred to, being the fourth ground of the demurrer to the amended complaint. The court overruled this ground of demurrer, and the claim therein set forth became one of the issues on the trial. It is nowhere denied in the amended complaint that Vassar owed the rent for which the attachment was sued out, nor is it any where shown that the attachment suit has been determined, or, if determined, what the determination was. Nor does the assignment of breach show or state any sum as paid or promised for defending the attachment suit. Assignment of breach No. 4 is scarcely sufficient. Possibly, it should have stated some amount incurred or promised as attorney's fee for defending the suit.—*F'lournoy v. Lyon*, 70 Ala. 308.

Each of the assigned breaches 1 and 2 avers that none of the statutory grounds for attachment existed. This was a sufficient assignment of breach to authorize a recovery of actual damages. The demurrers to these assignments were rightly overruled.—*McLane v. McTighe*, 89 Ala. 411.

The averments of breach in the several assignments 1, 2, are as follows: 1. "Said attachment was wrongfully and vexatiously sued out, and so sued out without the existence of any of the statutory grounds for the issuance of such attachment." 2. "Said attachment was wrongfully, vexatiously and maliciously sued out, in that no statutory grounds existed either for the enforcement of any existing lien, or for the purpose of creating a lien." Now, each of these breaches, properly interpreted, simply negatives the existence of a cause for suing out an attachment.

In *Durr v. Jackson*, 59 Ala. 203, it is said an action like the present one, "so far as the nature and character of the evidence necessary to sustain it is to be considered, bears a closer resemblance to an action for malicious prosecution, than to any other action at common law." In *City National Bank v. Jeffries*, 73 Ala. 183, speaking of the different counts of the complaint in that case, we said, that "as claims of exemplary damages; they are further faulty in not averring that the attachment was sued out without probable cause for believing the alleged ground to be true."—*McLane v. McTighe*, 89 Ala. 411. The first and second assignments

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of breach, though sufficient for the recovery of actual damages, did not authorize the recovery of vindictive damages.

The third ground of demurrer ought to have been sustained.—*City National Bank v. Jeffries, supra*. It would seem, however, that this error was cured, by the act of plaintiff "in striking out claim for special damages on account of wrongful levy."

The witness Brownlee, against objection of defendants, was permitted to testify, "that in the spring, and before the crop was planted, he heard Crofford say, after some difficulty between Crofford and Vassar, that he intended to get every thing that Vassar made on the plantation that year for nothing." We think, under appropriate pleadings, this testimony would be competent on the inquiry of exemplary damages. We have shown, however, that the complaint does not claim such damages. The City Court erred in receiving this evidence.

There was no error in allowing proof that the cotton was damaged by being allowed to remain in the field. If true, that was actual damage resulting from the attachment and its levy.

Reversed and remanded.

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Bill in Equity by Purchaser at Sale under Probate Decree, for Injunction of Actions by Decedent's Heirs at Law.

1. *Petition by administrator for sale of lands; averment of ownership.* In a petition by an administrator for an order to sell lands for equitable division, an averment that "the lands belonging to the estate of said decedent are the following," is a sufficient averment of ownership to support the jurisdiction of the court to grant an order of sale.

2. *Conclusiveness of order of sale.*—If the administrator's petition, though demurrable, contains the necessary jurisdictional averments, its defects are not available on collateral attack of the sale, the order of sale being conclusive.

3. *What lands may be sold.*—The statute authorizes the sale of an equitable interest in lands, as where the decedent had paid the purchase-money, or a part of it, but had not received a conveyance; but, if the administrator pays the balance of the unpaid purchase-money, and takes a conveyance to the heirs, he can not afterwards have the lands sold under the statutory jurisdiction of the court.

4. *Conclusiveness of confirmed sale.*—When a sale of lands has been made under a proper decree, reported to the court and confirmed; the

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purchase-money reported paid, and a conveyance ordered and made to the purchaser, its validity can not be assailed by the heirs on the ground that the purchase-money was not in fact paid, or that the sale was not made as directed.

5. *Estoppel against adult heirs.*—If the adult heirs, parties to the proceedings, allow the sale to be confirmed without objection, and the administrator to charge himself, on final settlement, with the purchase-money, decrees being rendered against him in their favor for their respective portions, they are estopped from afterwards assailing the validity of the sale; but the estoppel does not extend to infants, although represented by a guardian *ad litem*, if they have done nothing after attaining their majority to ratify the sale.

6. *Amendment of decree nunc pro tunc.*—If the order of sale refers to the petition as asking a sale for equitable division among the heirs, and to the depositions in support of it as proving that a sale is necessary for the payment of debts, this is a mere clerical misprision, which is amendable by the record; and the amendment may be made at a subsequent term, *nunc pro tunc*, without notice to the heirs.

7. *Decree for divestiture of title.*—Under a bill which seeks to divest the legal title to land out of the defendants and vest it in the complainant, the court may directly so order, adjudge and decree, without requiring the execution of a deed by the defendant, the register, or a special commissioner. (*Prewitt v. Ashford*, 90 Ala. 264, overruled, except as to proceedings instituted on its authority.)

APPEAL from the City Court of Anniston, in equity.

Heard before the Hon. B. F. CASSADY.

The bill in this case was filed on the 19th November, 1889, by the Woodstock Iron Company and the Anniston City Land Company, two private corporations, against Alice C. Jones, Walter L. Jones and others, as heirs at law of James M. Jones, deceased, and against A. H. Jones, who was not alleged to hold under them, or to have any connection with them; and sought to enjoin two actions of ejectment, one instituted by said heirs, and the other by said A. H. Jones, and to have the legal title to the lands sued for divested out of the defendants and vested in complainants. The complainants claimed the lands as sub-purchasers under a sale made by the administrator of said James M. Jones, under an order and decree of the Probate Court, and the defendants assailed the validity of the order and of the sale.

The following are the material facts shown by the record: James M. Jones died, intestate, on the 16th January, 1875, being at the time in possession of the lands, which he had bought from one E. C. Brock, who had bought from E. L. Woodward. Jones paid part of the purchase-money to Brock, assumed to pay the balance due to Woodward, and took an assignment of Woodward's bond for title; but he died without having paid the balance, and without a conveyance of the land. Letters of administration on the estate of said Jones were granted, on the 4th April, 1876, to W. H. Vol. 95.

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Hames, his son-in-law, who afterwards paid, out of the assets of the estate, the balance of the purchase-money due to Woodward, and procured his conveyance of the lands to the children of Jones, which was dated May 17th, 1877. On the 4th September, 1879, the administrator filed his petition in the Probate Court, alleging "that the lands belonging to the estate of the decedent are the following," describing them, and that they "can not be equitably divided among said heirs without a sale," and therefore prayed an order of sale. On the filing of this application, the court appointed a day to hear it, ordered notice to the adult heirs, and appointed a guardian *ad litem* to represent the minors. Notice was served on the adult heirs, and the guardian *ad litem* filed a formal answer for the minors. The administrator filed interrogatories to W. H. Forney and E. L. Woodward, each of whom testified that the lands could not be fairly divided without a sale, and that a sale would be beneficial to the heirs. The interrogatories to the witnesses and their depositions were filed on the 13th November, 1879, and on the same day the court granted an order of sale, reciting therein that the administrator had filed his petition asking a sale "on the ground that said real estate can not be fairly, equitably and beneficially divided without a sale thereof;" that notice had been issued to the heirs, and a guardian *ad litem* had been appointed for the minors; "and it appearing to the satisfaction of the court, by the oaths of E. L. Woodward and W. H. Forney, disinterested witnesses, whose testimony has been taken by deposition as in chancery proceedings, and which has been filed of record in this court, that said lands," describing them, "should be sold for the purpose of paying the debts of said estate; it is therefore ordered," &c., "that said application be granted, and said administrator is ordered to sell said lands at public outcry, on the following terms: one half cash, and the remaining half on a credit of twelve months, with note and two good and solvent sureties.

The administrator reported, June 21st, 1881, that he had offered the land for sale under the order, on the day named in the published notice, but had no bidders; "that said land is yet undisposed of, and is still the property of said estate; that there are still some small balances due from said estate, and a final settlement of said estate can not be had without a sale of said property. Again, four of the heirs of said estate are over the age of twenty-one years, and are anxious for their share of the estate, and, as has been shown by proof under former petition, said lands can not be equally divided

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among said heirs without a sale thereof. Therefore your petitioner asks that an order be again granted by your hon. court authorizing him to sell the land mentioned in his former petition, at such time and place, and for cash, as may seem right and beneficial for the interest of said heirs." On the same day the court made an order of sale, which recited the allegations of this petition, and that the court "is satisfied that the allegations thereof are true, and authorized the administrator to re-advertise and sell the lands, for cash, for the purpose of paying off some indebtedness against said estate, and for division among the heirs and distributees thereof." On the 30th August, 1881, the administrator made his report of the sale, and asked its confirmation; giving the name of Joseph A. Jones, one of the heirs, as the purchaser, at the price of \$1,749.60, and stating that he was ready to comply with the terms of the sale. On the filing of this petition, the court made an order appointing the 9th September for the hearing of it, "and giving all parties interested in said estate until that day to come into court and object or except to said report and sale." The record does not show or recite notice to the parties of this order, but the sale was confirmed on the 9th September, 1881, and the administrator was ordered to execute a deed to the purchaser; the order reciting the appearance of the administrator only, and that the court considered "all the evidence connected with said sale."

The facts above stated were shown by a transcript of the record of the proceedings had in the Probate Court, which was made an exhibit to the bill; and the transcript also showed that, on the 29th October, 1889, after the commencement of the two actions at law, the administrator filed his petition alleging the mistake in the last order of sale, as to the testimony of Forney and Woodward, and asking an amendment of the decree *nunc pro tunc* by a correction of the mistake; and the court made the amendment on the same day, reciting the facts.

The bill alleged that the "proceeds of the sale of said lands were regularly and properly distributed by the administrator among the heirs of said estate, and were received and appropriated by said heirs;" but this allegation was denied by the heirs, and they alleged that the administrator had never made a final settlement. It was shown by a transcript from the records of the Probate Court that the administrator had filed his accounts and vouchers for a final settlement on the 20th June, 1881, but the settlement was continued at his instance, and changed to an annual settle-

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ment; that in his account as filed, which was sworn to on the 21st May, 1881, was an entry of debit in these words: "Debits brought forward, \$1,767.60; to which add proceeds of sale of Anniston land sold July 21st, 1881, payment made Sept. 9th, 1881, from private sale of said land sold at public sale July 21st, 1881, \$2,000; making amount received to date, \$3,767.60;" leaving balance for distribution, \$1,800, or \$300 to each heir. The court passed the account as stated, and rendered a decree against the administrator, in favor of each of the heirs and distributees, for \$300. The probate judge certified that this was the last settlement shown by the records of his court, and the administrator himself testified that he had never made any subsequent settlement; but he claimed that he had settled with J. A. Jones for the interests which he represented, had himself retained his wife's distributive share, and also the shares of the two minors, who were then living with him, and who had no guardian; and that they were indebted to him, on that account, more than \$300 each.

The defendants also denied, in their answer, that there was ever any public sale of the lands by the administrator, and alleged that they were sold by private arrangement between the administrator, Joseph A. Jones, and an agent of the Woodstock Iron Company. In reference to this matter the administrator testified, and other testimony was to the same effect, that it was agreed between him and Joseph A. Jones, who acted for the other adult heirs, prior to the day appointed for the sale under the first order, that the land should be bought in by the estate, unless it brought \$2,000; that the highest bid at the sale was about \$1,740; that thereupon one Edmonson, acting for said Joseph A. Jones, bid \$1,749.60, and it was knocked down to said Jones as the purchaser, at that price; that said Jones, a few days or weeks afterwards, came to the administrator, and represented to him that he had found a purchaser for the land at the price of \$2,000; that he came to the administrator's office on the 9th September, 1881, accompanied by Jno. M. Caldwell, who, as the defendants insisted, was acting as the agent of the Woodstock Iron Company; that Caldwell then paid the administrator \$2,000, and the latter executed a deed to Joseph A. Jones as the purchaser at the sale, who at once executed a deed to said Caldwell. The administrator's deed to Jones recited that the sale was made on the 26th July, 1881, under the order of sale granted on the 21st June, 1881; that said J. A. Jones was the purchaser at the sale, at a price aggregating \$1,759.60; that the sale had

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been reported to the court, and confirmed; that Jones had paid the purchase-money, the payment had been reported to the court, and the administrator had been ordered to execute a conveyance to him as the purchaser; and the deed conveyed to said Jones all the right, title and interest of the estate in the lands. The deed of said Joseph A. Jones to Caldwell, also dated September 9th, 1881, recited the payment of \$2,000 as its consideration, and contained no warranties. Caldwell's deed to the Woodstock Iron Company was dated October 3d, 1881. The administrator testified that he received the \$2,000 from Caldwell, and charged himself with the amount in his account, as above stated, in order that the estate might get the benefit of the advanced price, and considered that he had made the sale under the order of the court.

The heirs filed a joint demurrer to the bill for want of equity, and a joint answer setting up the facts above stated in avoidance of the sale; and they also filed a cross-bill, offering to refund whatever amount of the purchase-money they had received, or were chargeable with, after deducting the rents and profits which the complainants had received, allowing them taxes paid and the value of improvements erected on the lands, and that the decree of sale be vacated as a cloud on their title. A. H. Jones joined in the demurrer and answer of the heirs, but did not show how he was connected with their title.

The court overruled the demurrers to the bill, and dismissed the cross-bill; and on final hearing, on pleadings and proof, rendered a decree for the complainants, declaring the legal title to the lands divested out of the defendants and vested in the complainants, and perpetually enjoining the actions at law. The defendants jointly appeal, and assign each part of this decree as error; and there are separate assignments of error by Alice Jones, Walter Jones, and Joseph A. Jones.

WATTS & SON, PARSONS & DARBY, GORDON MACDONALD, and KELLY & SMITH, for appellants.—(1.) The sale was void, whether made under the first or the second petition filed by the administrator. The first petition did not contain the necessary jurisdictional averments, because it did not allege or show that the decedent was seized and possessed of the lands at the time of his death, nor that he then had an estate in them which was subject to sale.—*Pettit v. Pettit*, 32 Ala. 288; *McCain v. McCain*, 12 Ala. 510; *Mounger v. Burks*, 17 Ala. 48; *Bishop v. Blair*, 36 Ala. 80. That decree
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was void for the further reason, that it did not conform to the petition, but ordered a sale for the payment of debts. *Tyson v. Brown*, 64 Ala. 244. If the sale was made under the second order, it was equally void, because the heirs had no notice of that petition, and because no proof was taken in support of it. The amendment *nunc pro tunc* was made without notice to the heirs, and it can not affect their rights. 72 Ala. 391; 54 Ala. 445. (2.) But the proof shows that the court had no power to sell the land under any petition, because the title had been conveyed to the heirs at the instance of the administrator.—*McCain v. McCain*, 12 Ala. 510; *Mounger v. Burks*, 17 Ala. 48; *McKay v. Broad*, 70 Ala. 380. The proof shows, also, that the sale was not made under either order, nor even at public outcry, but was a private arrangement effected between the administrator, Joseph A. Jones and Caldwell; and it was void for this reason.—*Lee v. Lee*, 55 Ala. 590; *James v. James*, 55 Ala. 525; 111 U. S. 640. (3.) A purchaser at a void judicial sale does not acquire any title, but only a right, at most, to compel his adversary to elect whether he will ratify or repudiate the sale on equitable terms.—*Freeman on Judicial Sales*, §§ 53, 55; *Cox v. Holcombe*, 87 Ala. 592; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; *Scott v. Dunn*, 30 Amer. Dec. 174, note; *Perry v. Adams*, 2 Amer. St. 51, note; *McGee v. Wallis*, 34 Amer. Rep. 584; 46 Geo. 101. (4.) No estoppel is shown against any of the heirs, except, possibly, Joseph A. Jones, who actively participated in the sale, and received his portion of the purchase-money. (5.) No ground of relief is alleged or proved against A. H. Jones, and the bill ought to have been dismissed as to him. (6.) The decree is erroneous in attempting to divest the title.—*Prewitt v. Ashford*, 90 Ala. 300.

JOHN B. KNOX, and CALDWELL & JOHNSTON, *contra*.—(1.) The petition may have been demurrable, but it is sufficient on collateral attack.—3 Brick. Digest, 467, §§ 182-3; Code, §§ 2105-14, and citations. (2.) Jurisdiction having attached, mere errors or irregularities will not avoid the sale on collateral attack.—3 Brick. Digest, 466, §§ 168-9. (3.) The mistake in the decree of sale, about selling for the payment of debts, is self-correcting, and notice of the amendment *nunc pro tunc* was not necessary.—*Nabors v. Meredith*, 67 Ala. 333; 3 Brick. Digest, 577. (4.) It can not be denied that James M. Jones, at the time of his death, had an equitable interest in the land, which was subject to sale under a decree of the Probate Court.—*Rice v. Drennen*, 75 Ala. 338. The legal

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title afterwards acquired by the heirs did not disturb this interest in the estate, nor deprive the court of power to sell it. The sale was made for the benefit of the heirs, and they were parties to the proceeding. The decree recites that the land belonged to the estate, and the recital is conclusive on the heirs. The decree can only be impeached for fraud. *Mervine v. Parker*, 18 Ala. 241; *Kellam v. Richards*, 56 Ala. 238; *Whitlow v. Echols*, 78 Ala. 206; *Landford v. Dunklin*, 71 Ala. 594; *Cornett v. Williams*, 20 Wall. 226. (5.) If the minor heirs are entitled to any relief, they can not have it under the pleadings as now presented.

COLEMAN, J.—The bill was filed to enjoin suits in ejectment, commenced by the heirs of James M. Jones, to recover certain lands which were sold under an order of the Probate Court; and also to have the legal title to the lands sued for divested out of said heirs, and invested in complainants. The facts sufficiently appear in the statement of the facts of the case, in the further progress of this opinion.

The petition to the Probate Court of Calhoun county, in its allegations for the sale of the lands for distribution, sufficiently complied with the statute to give jurisdiction to the court.—Code of 1886, § 2106; Code of 1876, §§ 2449, 2450. Citations to the parties in interest regularly issued, and a guardian *ad litem*, who accepted the appointment to represent the minor heirs, appeared and represented them in the proceedings in the Probate Court to have the lands sold for distribution.

Even though a petition be subject to demurrer, or a judgment on the demurrer be reversible for error on appeal; yet, if the petition sufficiently alleges all the necessary jurisdictional facts, and final judgment is rendered thereon, from which no appeal is taken, such irregularities or reversible errors can not avail when the judgment is collaterally assailed.—*Whitlow v. Echols*, 78 Ala. 208; *Pollard v. Hanrick*, 74 Ala. 337; 3 Brick. Digest, 467, §§ 182, 183, 185.

The Probate Court has jurisdiction to sell for division lands in which the decedent held only an equitable interest. *Pettit v. Pettit*, 32 Ala. 288; *Vaughan v. Holmes*, 22 Ala. 595; *Rice v. Drennen*, 75 Ala. 338; *Jennings v. Jenkins*, 10 Ala. 285; *Duval v. McClosky*, 1 Ala. 708. The statute which authorizes the Probate Court to sell land for division is as follows: "Lands of an estate may be sold by order of the Probate Court having jurisdiction of the estate, when the same can not be equitably divided among the heirs or devisees."—Code, § 2105. A difficulty arises as to what con-

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stitutes "lands of an estate," within the meaning of the statute. The preceding section, in regard to the sale of lands for the payment of debts, uses the same broad term, "land." As we have seen, the statute includes a mere equity in lands; and in the case of *Vaughan v. Holmes*, 22 Ala., *supra*, it was held that a purchaser of lands, who died before paying the entire purchase-money, had such inchoate interest or equity as was subject to sale under the statute by decree of the Probate Court.

When a sale of lands for distribution has been made in pursuance of an order of the court having jurisdiction of the question, and on proof taken as required by the statutes, and the sale and payment of the purchase-money regularly reported to the court, and confirmed by a decree of the court, and a conveyance of the title is executed to the purchaser, in pursuance to an order of the court to that effect, no fraud being alleged, the validity of the sale and the title of the purchaser can not be collaterally assailed by showing that the purchase-money was not paid as reported, or that the sale in fact was not made as directed by the court. These questions are judicially ascertained and adjudicated by the judgment of confirmation. It makes no difference that the Probate Court is of limited jurisdiction. After it has properly acquired jurisdiction, its judgments have the same extent, and are as conclusive *quoad rem* and the parties properly before it, as judgments of courts of general jurisdiction. A purchaser at such sale is only bound to see that the court had jurisdiction.—*Wyman v. Campbell*, 6 Ala. 219; *Whitlow v. Echols*, 78 Ala. 210; *Farley v. Dunklin*, 76 Ala. 530; *Kellam v. Richards*, 56 Ala. 240; *Stevenson v. Murray*, 87 Ala. 442; *Cantalou v. Whitley*, 85 Ala. 248; *Goodwin v. Sims*, 86 Ala. 102; *Morgan v. Farned*, 83 Ala. 367.

These general propositions of law are subject to the qualification, that the statute which confers the power on the Probate Court to sell lands for distribution extends only to the title or estate as it descended, and not to an after-acquired title or interest different and distinct from that which the intestate had at the time of his death. In support of this qualification of the general principle, the following authorities are cited: *Johnson v. Collins*, 12 Ala. 336; *Pettit v. Pettit*, 32 Ala. 288, 305; *Burns v. Hamilton*, 33 Ala. 213; *Cothran v. McCoy*, *Ib.* 65; *Bishop v. Blair*, 36 Ala. 380; *McCain v. McCain*, 12 Ala. 510; *McKay v. Broad*, 70 Ala. 380; *Whorton v. Marange*, 62 Ala. 207; *Mounger v. Burks*, 17 Ala. 50; *Rice v. Drennen*, 75 Ala. 338.

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The citations from 36 Ala., 33 Ala., 32 Ala., and *Johnson v. Collins*, 12 Ala. 336, are not directly in point, though often quoted to the proposition. In the case of *Pettit v. Pettit*, 32 Ala., *supra*, the conclusion of the court rested upon the fact that the contract of the intestate for the purchase of land was void as contravening public policy, and in violation of a statute of the United States, and this defect was apparent upon the petition to the Probate Court for the sale of the lands.

In the case of *Johnson v. Collins*, 12 Ala., the conclusion of the court was, that the intestate had no inheritable or devisable interest in the lands, either legal or equitable, and consequently there was nothing upon which the order of the court could operate; that under the pre-emption law, the heir, by virtue of the statute, was entitled to perfect the inchoate pre-emption right of the settler, and not the administrator of the intestate. The other case cited from 33 Ala. merely re-affirmed the same ruling.

The proposition, however, is broadly stated and declared in *McCain v. McCain*, 12 Ala. 510. In this case, the intestate had purchased the land, and died without making payment of the purchase-money, and before receiving the title. His administrator paid the unpaid balance of the purchase-money, and titles were made to the heirs of the decedent. The court held the power to sell lands for distribution "is only given when the land remains in the same condition as to the title as it was at the decease of the intestate, but has no power when the title of the ancestor has been divested and made to the heirs."

The facts in the case of *Bishop v. Blair*, *supra*, show that Mrs. Bishop, with funds of her husband's estate, entered certain lands. Under a petition by her, as executrix, to the Probate Court, these lands were represented as belonging to the estate of her deceased husband, and as such were decreed to be sold for division. It was held that the court had no jurisdiction to sell the lands for distribution, and the order of the court for this purpose was null and void. The rule has been recognized without a single departure to the present time, since it was first declared in *McCain v. McCain*, 12 Ala., *supra*. Whatever hardships may arise, it is now a rule of property too firmly fixed to be departed from, without legislation.

So far as the adult heirs are concerned, we are firmly convinced that they are estopped from asserting any claim hostile to that of the purchasers. These adult heirs, with a full knowledge of all the facts, permitted the sale of

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the lands to be reported to the court, and the sale confirmed by the decree of the court. They were parties to the settlement by the administrator, in which he charged himself with the proceeds of the sale of the land, and decrees were rendered against him for their proportionate share of the purchase-money. The principle is not unlike that which was applied in the case of *Bell v. Craig*, 52 Ala. 216, in which it was held, that although the sale of the lands was void, the settlement by the administrator and decree against him estopped the heirs from questioning the validity of the order under which the sale was made. See, also, *Whitehead v. Jones*, 56 Ala. 156; *Bland v. Bowie*, 53 Ala. 161; *Pickens v. Yarborough*, 30 Ala. 410; *Robertson v. Bradford*, 73 Ala. 118; *Bishop v. Blair*, 36 Ala. 83; *Rice v. Drennen*, 75 Ala. 338; *Nunn v. Norris*, 58 Ala. 202.

The decree of the court ordering the sale of the land was rendered in the year 1879; the sale made in June, 1881, reported and regularly confirmed in September, 1881; and the purchasers have been in possession ever since, have erected valuable improvements thereon, and their title never questioned until January, 1888, when suit in ejectment was instituted by the two minor heirs to recover the land. It can not be tolerated in a court of equity that the adult heirs can, at this late day, repudiate the sale, and recover back the land. Their claim constitutes a cloud upon the title of the complainants, which entitles them to relief in a court of equity. Although the minor heirs, Alice and Walter Jones, waited several years after attaining their majority before commencing legal proceedings in ejectment to recover their interest, it does not appear from the record, or in proof, that personal knowledge of the proceedings in the Probate Court for the sale of the land, and of the final settlement by the administrator, and the decree in their favor against him for the purchase-money, was brought home to them, or that they have ratified the settlement, or done any act which would estop them from asserting their claim. Complainants seem to have acted in good faith in their purchase, and in making improvements thereon, and the equities of the parties as to rents, or in case of partition, if such proceedings should be instituted, can be fully adjusted upon proper pleadings in a court of equity.

The answer, cross-bill and demurrers of the minor heirs are filed jointly with the adult heirs, who are not entitled to relief. The pleadings should be amended, if desired, so as to separate the rights and interest of the minor heirs from the adult heirs.

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If the decree of the court upon the petition of the administrator for the sale of the lands was not otherwise invalid, the amendment *nunc pro tunc* was properly made. The petition to the Probate Court sought to have the lands sold for an equitable division. The citation to the heirs so stated. Proof was taken by deposition to show that the lands could not be divided without a sale, and which depositions were ordered to be filed as a part of the record of the proceedings. The decree itself provides that the petition be granted. It is perfectly evident that the recital in the judgment, that the lands be sold for the purpose of paying the debts, was a mere clerical mistake, capable of correction *nunc pro tunc*, if indeed, when considered in connection with all the *quasi*-record memoranda and the record proper, it did not correct itself. The proceedings being *in rem*, as between the administrator and heirs, notice to the heirs of the motion to amend *nunc pro tunc* was not necessary.—*Farley v. Dunklin*, 76 Ala. 532; *Goodwin v. Sims*, 86 Ala. 102; *Nabors v. Meredith*, 67 Ala. 333; *Whorley v. M. & C. R. R. Co.*, 72 Ala. 22.

The record nowhere shows how the rights of A. H. Jones are involved in this case, and it does not appear upon what grounds the injunction was issued and made perpetual as against him.

It is insisted that the decree of the equity court is erroneous, in that it undertook to "invest the legal title" in the complainants. The case of *Prewitt v. Ashford*, 90 Ala. 300, supports the contention. We would correct the decree in this respect, if we deemed it necessary. A deed made in pursuance of a decree of a court of equity, executed by any other person than the legal owner, *proprio vigore* would not convey the legal title. Such an instrument derives its entire strength from the decree. It is the decree at last, and not the instrument itself, which makes it effectual to convey or invest the legal title. Courts of equity in this State have long pursued the practice of investing the legal title by its decrees. This practice was not only sanctioned but expressly authorized by the decision of the Supreme Court of this State. As far back as 19 Ala. 481, 490, *Brewer v. Brewer*, DARGAN, C. J. proceeding to render "such decree as the court below should have rendered, ordered, adjudged and decreed, that Thos. J. Brewer be invested with the legal title," &c. This early decision has become a rule of property, and to hold otherwise now would upset a great many legal titles. We adhere to the old rule, and so far as *Prewitt v. Ashford*, *supra*, conflicts

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with it, the latter is hereby qualified. Either course would be efficient to invest a legal title. That no injustice may be done to litigants who, under the influence of the decision made in the case of *Prewitt v. Ashford*, *supra*, have instituted proceedings to procure the legal title, we declare and hold that as to such cases the case of *Prewitt v. Ashford* operates as a rule of property.—*Furrior v. New England Mortg. Sec. Co.*, 92 Ala. 176.

The decree of the City Court is affirmed, so far as it granted relief to complainants against the adult heirs of James M. Jones; and reversed so far as relief was granted against Walter Jones and Alice Jones, who were minor heirs at the time of the sale and settlement, and against A. H. Jones.

The judgment of this court reversing the decree rendered against the minor heirs and A. H. Jones is not to be construed as dissolving the temporary injunction enjoining the prosecution of the ejectment suits, but as to such matter the question is left open for the consideration of the lower court, if the pleadings should be amended, and other proof offered, in the further progress of the cause.

One half of the costs of the appeal must be paid by the adult heirs of James M. Jones, and the other half by the appellees.

Affirmed in part, and reversed in part.

Bruce v. Bruce.

Statutory Detinue for Cattle.

1. *When action lies by wife against husband.*—Under the statutory provisions now of force (Code, §§ 2341-51), the wife may maintain an action against the husband for the recovery of personal property which she acquired by gift from him prior to the passage of those statutes.

2. *Charge as to sufficiency of evidence.*—A charge instructing the jury that it is incumbent on the plaintiff to prove that the property sued for belonged to him when the suit was brought, and that the defendant had no title or interest in it, and no right to detain it, is properly refused.

3. *Estoppel against wife.*—If the husband, on a voluntary separation between him and his wife, allows her to take some of his cattle, intending it as a settlement of her claim to some of them, this does not estop her from afterwards claiming others which belonged to her, unless she consented to so take them.

95	563
98	361
95	563
98	80
95	563
102	473
95	563
107	613
108	551
95	563
125	584
95	563
144	537

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APPEAL from the Circuit Court of Conecuh.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Eliza Bruce against her husband, Stephen Bruce, to recover four head of cattle, and was commenced on the 26th August, 1889. The parties were formerly slaves, and were married after emancipation; and they lived together until February, 1887, when they separated. The cattle were bought before their separation, one from a Mr. Hammond, and the mother of the others from Mr. Ingram; and each party claimed to have furnished the money to pay for them. The plaintiff testified that the money was partly the wages of her son by a former husband, and the balance was the proceeds of the sale of cotton which her husband allowed her to raise on a "patch" of her own. The evidence showed, also, that when the parties separated, the defendant told his wife to go to the pen and pick out what cattle she wanted, and she did so; but these were not the cattle sued for. The defendant pleaded *non detinet*, and the plaintiff's coverture; and the plaintiff replied to the latter plea, that the cattle belonged to her separate estate, after demurrer overruled to the plea.

The court charged the jury as follows: "If the jury are reasonably satisfied from the evidence that the plaintiff bought the cattle from Howard and Ingram, and that they sold the cattle to her, and that she paid for them, either with her own money, or with money which she received as the proceeds of her own labor; and that her husband gave her her own labor, or the proceeds thereof; and that the cattle sued for are the increase of the cattle so bought, then she has such a right to them as will enable her to maintain this suit, and she will be entitled to recover, if in other respects she has made out her case."

The defendant excepted to this charge, and also to the refusal of each of the following charges, which were asked by him in writing: (1.) "It is incumbent on the plaintiff to prove to the satisfaction of the jury that the cattle sued for belonged to her when the suit was brought, and that the defendant had no title or interest in them, and no right to detain them." (3.) "If the jury are satisfied by the evidence that the plaintiff is a married woman, and was at the time she brought this suit, then she can not maintain the suit as it is here brought." (4.) "If the proof satisfies the jury that plaintiff and defendant are husband and wife, and were at the commencement of this suit, although not living together, they should find for defendant." (6.) "If the proof reasonably satisfies the jury that, after February 28th,

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1887, the cows which had been previously divided between the parties went back to defendant's, and that plaintiff went or sent to him for them, and defendant intended this as a settlement of the division of the property, this would estop plaintiff from bringing this suit, and their verdict should be for the defendant."

STALLWORTH & BURNETT, for appellant.

BOWLES & RABB, *contra*.

WALKER, J.—The statute provides, in general terms, that the wife must sue alone for the recovery of her separate property.—Code of Ala., § 2347. The language is broad enough to include a suit by her against her husband. The conclusion that the wife may now sue her husband at law is supported by other provisions of the "Married Woman's Statute." Important contract and property rights of the wife, for the enforcement of which the statute requires her to sue alone, are so far without the influence of the marital relation that they may as well be violated by the husband as by any stranger. The earnings of the wife are her separate property: she has the control and management of her separate estate, and is entitled to the rents, income and profits; she may contract with her husband; if he is living apart from her, without fault upon her part, or if he be of unsound mind, she may convey or dispose of her real or personal property in any manner as if she were *sole*; and, without the consent of her husband, if he is of unsound mind, or has abandoned her, or is a non-resident of the State, or is imprisoned under conviction for crime, she may enter into and pursue any lawful trade or business, as if she were *sole*.—Code, §§ 2341-2350. Her husband, like any other person, may unlawfully deprive her of her separate estate, or become liable on a contract with her. The statute certainly establishes a rule which, as to the classes of cases covered by its provisions, operates to remove the common-law disability of the wife to sue alone. Suits against the husband are not, in terms or by implication, excepted from the operation of the statute. It is provided, in general terms, that the remedy for the enforcement of certain rights of the wife is by suit in her name alone. Some at least of those rights exist in her favor as against her husband. There is nothing in the statute to show that the existence of the marital relation affects or impairs the remedy for their enforcement. Our conclusion is, that if the suit is one

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which the statute requires to be brought in the name of the wife alone, it may be prosecuted against her husband, if he is the party responsible for the violation of the right to be vindicated by the suit. The effect of the statute is, that the legal rights of the wife as against her husband may be enforced by legal remedies. The demurrers to the pleas of coverture were properly sustained; and charges 3 and 4 requested by the defendant were properly refused.

Prior to the present statute, property purchased by the wife with her own money, or with money which she earned, and which her husband permitted her to retain, was, as between herself and her husband, her separate estate.—*Carter v. Worthington*, 82 Ala. 334; *Bush v. Henry*, 85 Ala. 605. When the rights of creditors are not involved, it is immaterial to inquire whether it belongs to her statutory separate estate or to her equitable separate estate; for, with a single exception not now necessary to be mentioned, the distinction between the two classes of estates has been abrogated, and property acquired by the wife by gift from, or contract with her husband, is her separate property within the meaning of the present statute, and may be recovered in an action at law in her own name.—Code, §§ 2347, 2351; *Rooney v. Michael*, 84 Ala. 585. The rights of the husband, as trustee of the wife's statutory separate estate, were created by statute, and could be taken away in like manner. *Mem. & C. R. Co. v. Bynum*, 92 Ala. 335; *Ramage v. Towles*, 85 Ala. 589. As to her equitable separate estate, if not limited or restrained by the instrument creating it, in a court of equity the wife was regarded as a *femme sole*, and could bind or charge the estate by any contract which would bind her if *sole*.—3 Brick. Dig. 548, § 85. The statute gives legal recognition to such estates, and authorizes the pursuit of legal remedies for their protection. No constitutional right of the husband is affected by a statute giving the wife a standing in a legal forum in reference to property which, under the rules enforced by courts of equity, she could already deal with as if she were *sole*. As to neither of the two classes of estates does the statute purport to have any such retrospective operation as to impair any vested right of the husband. He has no right to complain that the remedies in favor of the wife for the protection of her separate property are changed and enlarged. The wife alone may now sue for the recovery of her separate property, whether, before the enactment of the statute now in force, it belonged to her statutory or to her equitable separate estate. There was evidence tending to show the state of facts hypothesized

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in the part of the general charge to which an exception was reserved. The proposition there asserted was correct under the rules above stated.

If the plaintiff offers evidence to support a state of facts on which he is entitled to recover, it is not incumbent upon him to go further and show affirmatively that the defendant has no defense. Charge one requested by the defendant was incorrect, in putting upon the plaintiff the burden of proving more than was required to entitle her to a recovery.

The plaintiff and the defendant had been living apart for several years. There was evidence tending to show that, when they separated, the defendant gave certain cattle to the plaintiff. The mere fact that the defendant intended this as a settlement of the plaintiff's claim could not affect her title to property which already belonged to her, and which she did not consent to give up. Plaintiff's acceptance of the defendant's gift to her did not estop her from claiming what was already her property. Charge six requested by the defendant was properly refused.

Affirmed.

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97	622

Redwine v. Sides.

Action on Account, for Services of Jack.

1. *Custom, or usage.*--When a local custom or usage, relating to the subject-matter of a contract, is proved to be general throughout the county in which the contract was made, and in which the parties resided, they are presumed to have had knowledge of it, and to have contracted with reference to it, if it does not contradict an express term of the contract.

2. *Contract for services of jack to mare.*--Under a contract for the service of a mare by a jack, "to insure or no pay, and if mare is sold, the money is due at the time of the sale," the money becomes due at the time of the sale, whether the mare is with foal or not.

APPEAL from the District Court of Colbert.

Tried before the Hon. W. P. CHITWOOD.

This action was brought by Thos. A. Sides against Mark Redwine, and was commenced in a justice's court. The plaintiff claimed \$8.00 "for season of mare to plaintiff's jack, on or about the 23d January, 1891," and \$15.00 due by account; but the only controversy was as to the former

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item. It was proved on the trial that the mare was put to the jack once in July, 1890, and was not brought back a second time; that there was no express contract as to the charge, but the plaintiff had posted a notice as to the terms of service, and the defendant admitted that he had seen the notice and knew its contents. The printed notice was in these words: "I will stand my jack at my residence this season, commencing April 1st, 1890, to insure or no pay; and if mare is sold, the money is due at time of sale. Every precaution taken to prevent accidents, but I give no insurance against the same." The mare was sold by the defendant in September, 1890, and the evidence was conflicting as to whether she then was, or ever had been, in foal by the jack. The defendant contended that she never was with foal, and therefore he was not liable to pay for the service of the jack; while the plaintiff's contention was that the money became due and payable when the sale was made, whether the mare was with foal or not. The plaintiff introduced a witness who testified that he lived in the county, "knew the custom of standing horses in the county, and had handled horses for some time himself;" that when a mare was carried to a horse, it was customary to carry her during the season; that if she proved to be not with foal, the owner would have nothing to pay, but, if she was put to the horse only once, and was then sold or traded, he would have to pay for it. The court admitted this evidence, against the objection and exception of the defendant. On all the evidence adduced, the court rendered judgment for the plaintiff, and its judgment is here assigned as error, with the admission of the evidence objected to.

KIRK & ALMON, for appellant.

R. ARMSTRONG, and JACKSON & SAWTELLE, *contra*.

MCCLELLAN, J.—A jury not having been demanded, this cause was tried by the judge of the District Court, and this appeal presents "for review the conclusion and judgment of the court upon the evidence;" and in discharging this duty we are not allowed to indulge any presumptions favorable to the correctness of the trial court's action. Acts 1890-91, pp. 605 *et seq.*, § 15.

The usage or custom proved on the trial was, in our opinion, properly admitted and considered by the court in reaching a conclusion as to the meaning of the contract between the parties. We understand from the evidence of

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the witness Walker that the usage or custom deposed to by him was a general one in the county where the parties lived, the contract was made, and the services, to recover compensation for which under the contract this suit is prosecuted, were performed. This evidence, therefore, raises up a *prima facie* presumption, which no effort is made to rebut, that the parties knew of the usage thus pertaining to the subject-matter of their contract, and that they stipulated with reference to it in such way as to make it a part of their compact.—*German Amer. Ins. Co. v. Commercial Fire Ins. Co.*, ante, 469.

The contract itself consisted of a notice posted by the plaintiff, setting forth the terms upon which he would let his jack go to mares, the knowledge of defendant of the terms so advertised, and his acceptance of them implied from the fact he had his mare served without any special stipulations in respect thereto. The terms of the contract thus made, so far as involved in this case, were, that plaintiff was to receive for the services of his jack \$8.00, to "insure or no pay;" and that "if mare is sold, the money is due at time of sale." This last clause, as interpreted in the light of the usage proved, means that if the mare, after being served, is sold during the "season," her owner (at the time of the service) would have to pay the fee of eight dollars, whether she were foaled or not; the stipulation doubtless being incorporated in view of the difficulty of ascertaining whether the mare is with colt consequent upon her sale and possible removal out of the neighborhood, and for the purpose of shifting the risk in that event on the owner, by whose act this difficulty is created, though, where no sale is made, the risk in this regard is taken by the owner of the jack. And this, it seems to us, is a just and reasonable construction of the clause in question, dissociated from the usage and custom shown by the evidence. We are unable, indeed, to find any field for the operation of this stipulation, if this be not a correct interpretation of it. It can not be held to mean only that where a mare is *foaled*, and the "insure or no pay" stipulation thereby filled, the fee shall become due and payable on a sale of the mare, since where that is the case, the claim is due and payable as soon as the fact is ascertained, whether the mare is sold or not, and the stipulation would in reality mean nothing. No other plausible or even possible operation for the clause suggests itself, or has been suggested to us; and our conclusion, both upon and without a consideration of the usage, is, that upon a sale of the mare during the

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season, whether foaled or not, the owner becomes absolutely and unconditionally liable for the fee of eight dollars. It is uncontroverted in this case that the mare, after being served by the plaintiff's jack, was sold during the "season" by the defendant; and it follows that the judgment rendered against him by the City Court must be affirmed.

Affirmed.

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Mandamus to Chancellor, in matter of Revivor.

1. *Filing claims against decedent's estate in equity, under order of court; revivor of claim; mandamus.*—When the administration of a decedent's estate has been removed into equity, under bill filed by the administrator, and that court has made an order requiring creditors to file their claims within a specified time; if a creditor's claim is filed, proved, reported valid by the register under a reference, and his report confirmed without objection; and the creditor then moves to set aside the order requiring claims to be filed, but dies before his motion is acted on, and before formal decree has been entered allowing his claim, his personal representative, or the succeeding administrator *de bonis non* of the estate which he represented, may intervene by motion or petition, for the purpose of prosecuting the claim and the pending motion to a final determination; and if his motion or petition is overruled and refused, this court will award a *mandamus* to compel its allowance.

2. *Revivor of judgment against decedent.*—Under statutory provisions, a judgment recovered against the decedent in his life-time can not be revived or enforced against his administrator except by suit (Code, § 2880); but, when the judgment has been filed as a claim against the decedent's estate, under an order of court made in a pending chancery suit, and the creditor dies before its final determination, the right of revivor is secured to his personal representative by other statutory provisions (§§ 2265, 2603), and the former statute does not apply.

FROM the Chancery Court of Talladega.

Heard before the Hon. S. K. McSPADDEN.

In the matter of the estate of Edward Gantt, deceased, the administration and settlement of which was removed into the Chancery Court, under a bill filed by the administrator, May 28th, 1878. On the 17th February, 1881, the court made a decretal order assuming jurisdiction of the estate, and ordering a transfer of the papers from the Probate Court; and another order was made, at the instance of the administrator, on the 21st April, 1886, requiring creditors to file their claims

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95	570
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against the estate with the register within 120 days. A claim was filed, but at that time the record does not show, by Mrs. Hannah E. Reynolds, as administratrix of the estate of Walker Reynolds, deceased; which claim consisted of the record of a judgment which said Walker Reynolds had recovered against said Edward Gantt in October, 1867. This transcript was afterwards withdrawn, but seems to have been again filed. On the 9th August, 1886, before the expiration of the 120 days, Mrs. Reynolds filed a petition to set aside the order requiring creditors to file their claims, on the ground that it was unadvisedly made, and she desired to prosecute an action at law which she had instituted on the judgment. The cause was submitted on this motion, October 19th, 1886, but the record does not show that the motion was ever acted on. (The transcript, however, does not purport to be complete, but is made up by agreement of selected portions.) On the 30th December, 1886, the register made his report under the order of reference, and reported that the claim of Mrs. Reynolds, "there being no objection, was proved and allowed for," principal and interest, \$3,356.18. Objections were filed, however, to the register's report on the claim of the administrator for services rendered; and a re-reference being ordered as to that matter, the entire report was confirmed. In March, 1891, the death of Mrs. Hannah E. Reynolds was suggested, and leave was granted to O. M. Reynolds as her administrator, and also as administrator *de bonis non* of Walker Reynolds, deceased, "to be made a party complainant in this cause as such administrator." On the 28th September, 1891, O. M. Reynolds, as administrator, submitted a motion "that the order or decree allowing the claim of the estate of said Walker Reynolds against the estate of said Edward Gantt, which was made by the register on, to-wit, the 30th December, 1886, and confirmed by this court on, to-wit, the 5th day of October, 1887, be revived in his name and favor, as administrator *de bonis non* of the estate of said Walker Reynolds." The court overruled and refused this motion, and said Reynolds appealed from the order, assigning it as error; and motion being made to dismiss the appeal, he asked a *mandamus*, in the alternative, to compel the allowance of his motion.

JNO. M. CHILTON, for appellant and petitioner.—(1.) When the administration and settlement of a decedent's estate has been removed into the Chancery Court, that court proceeds according to its own practice.—*Hall v. Wilson*, 14 Ala. 295

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Taliaferro v. Brown, 11 Ala. 702. An order requiring creditors to file and prove their claims may not have been necessary or proper, but it was made without objection, and creditors availed themselves of it. If it was improperly granted, it was a mere irregularity, and not available on collateral attack, especially where the parties in court did not object to it.—2 Brick. Digest, 158, § 20; *Cox v. Davis*, 17 Ala. 714; *Nunn v. Nunn*, 66 Ala. 35; *Thompson v. Lea*, 28 Ala. 453. When creditors are required to come in and prove their claims, as in this case, any creditor, or any party to the suit, may contest the validity of the claim of any other creditor.—2 Dan. Ch. Pl. & Pr. 1172; 2 Smith's Ch. Pr. 548; 1 Story's Equity, § 548; *Owen v. Dickinson*, 1 Cr. & Ph. 48, 56. Having this right, and not having exercised it, they are concluded by the decree.—3 Brick. Digest, 580, § 75; 70 Ala. 432. Parties who have a right to be heard before the register, and who fail to except to his rulings or action, can not afterwards call his report in question. *Nunn v. Nunn*, 76 Ala. 35; *Waldrop v. Carnes*, 62 Ala. 374; *Davenport v. Bartlett & Waring*, 9 Ala. 179; *Gerald v. Miller*, 21 Ala. 433. It would work the greatest injustice to creditors who have filed and proved their claims under the order of the court, to permit the validity of their claims now to be questioned, since the 120 days have expired, and the statute of limitations may bar an action at law. As matter of fact, the judgment in favor of Walker Reynolds was rendered more than twenty years ago. (2.) The claim was allowed by the register, and his report was confirmed; and this was a judicial determination of its validity, without a formal decree, or the award of execution.—*Colt v. Barnes*, 64 Ala. 108; *Weaver v. Cooper*, 73 Ala. 318; *Hastie v. Aiken*, 67 Ala. 313; 3 Brick. Digest, 34, § 12. (3.) The recitals of the record show that Mrs. Hannah Reynolds, as administratrix, was made a party, and it is immaterial that this was improperly done. (4.) This is not an attempt to revive a judgment. The judgment has been filed, under the order of the court, as a claim against the decedent's estate, and, since the death of the administratrix, there is no one to prosecute it. The general statute gives the right to revive.—Code, § 2603; Rule of Chancery Practice, No. 102. (5.) That an appeal lies in this case, see *Savannah v. Jessup*, 106 U. S. 563; *South Carolina v. Railroad Co.*, 8 S. C. 129. If an appeal is not the proper remedy, appellant prays for a *mandamus*.—*Moore v. Randolph*, 52 Ala. 530; 3 Brick. Digest, 627, § 39.

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BISHOP & WHITSON, and with them WATTS & SON, *contra*. (1.) The bill was filed by the administrator for the purpose of obtaining the directions of the court as to the construction of the decedent's will, to determine what part of the property devised should be first subjected to the payment of debts and expenses. Creditors were not interested in the questions involved, and they were not made parties. The order requiring creditors to file and prove their claims was proper and necessary to enable the court to ascertain how much of the property must be sold or retained by the administrator, before making partial distribution among the legatees and devisees; but their claims were not adjudicated. *Clay's Adm'r v. Gurley*, 62 Ala. 14; *Byrd v. Jones*, 84 Ala. 339; *Phillips v. Smith*, 62 Ala. 575. (2.) The administratrix of Walker Reynolds never was a party to the suit, and the court could not make her a party.—*Renfro Bros. v. Goetter, Weil & Co.*, 78 Ala. 311; *Flournoy v. Harper*, 81 Ala. 499; *Cowles v. Andrews*, 39 Ala. 129; *Gay, Hardie & Co. v. Brierfield Coal & Iron Co.*, 94 Ala. 303; *Ex parte Printup*, 87 Ala. 149. Having proved and filed her claim as a creditor, Mrs. Hannah Reynolds had a standing in court to object to any other claim against the estate, and to that extent only she was recognized as a party.—54 Ala. 8; 62 Ala. 575. (3.) No decree was rendered in favor of Mrs. Hannah Reynolds as administratrix; and if a decree had been rendered, it could not be revived in favor of her successor in the administration; nor could the judgment against the decedent be revived, except by action at law.—Code, § 2280; *May v. Parham*, 68 Ala. 256. If the allowance of the claim of Mrs. Reynolds as administratrix can be regarded as a judgment against Gantt's estate, it can not be revived against a succeeding administrator.—*Bobo v. Gunnels*, 92 Ala. 602. (4.) Under the pleadings in this case, a judgment could not have been rendered in favor of Mrs. Reynolds as administratrix. *Scott v. Ware*, 64 Ala. 181.

COLEMAN, J.—The original bill in this case was filed by Jno. T. Heflin, administrator of Edward Gantt, deceased. Among other things the bill prayed "that the Chancery Court would assume jurisdiction and control of the settlement of the estate, and by appropriate orders remove the same from the Probate Court of Talladega county to the Chancery Court." At the February term, 1881, it was ordered and decreed, "that this court hereby assume and take jurisdiction of the further administration of the estate of Edward Gantt, deceased, and that the jurisdiction and

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control of the Probate Court of Talladega county over the same be and is hereby *dissolved* out of said court, and is invested in this court." The decree then proceeds to make provision for a transfer of the orders and proceedings had in the Probate Court to the Chancery Court.

On the 21st day of April, 1886, among other things, the Chancery Court made and entered a decree, that the register give notice to the creditors of Edward Gantt, "requiring them to present their claims against said estate to the register of this court, and file the same with the said register, duly sworn to as directed by law, within 120 days of the adjournment of this court, or said claims will be forever barred." In pursuance of this order, Hannah Reynolds, as administratrix of the estate of Walker Reynolds deceased, filed and probated a claim against the estate of Edward Gantt, which amounted to \$3,658.18. Various other claims were filed and probated not involved in the question under consideration.

Under a reference ordered by the court to report upon claims, that of Hannah Reynolds, administratrix, was reported by the register as a valid claim. No exceptions were filed to this claim, although there were various exceptions filed against the report of the register upon other claims. In September, 1887, it was ordered and decreed, "that the register's report be, and the same is hereby, in all things confirmed." No other decree was rendered adjudicating and declaring the validity and amount of the claims allowed and reported by the register, further than the order of confirmation which we have quoted.

After filing the claim due the estate of Walker Reynolds, deceased, and before the report of the register on claims was made, Hannah Reynolds, as administratrix, on the 19th of October, 1886, appeared, and "moved the court to vacate the order of the court requiring the creditors to file their claims in this court." It seems that this motion was submitted for decree, but we have been unable to find any disposition of it. It is still pending and undisposed of, so far as appears from the record. At the March term, 1891, the following order was made: "Came on this, the 23d day of March, 1891, the parties by their solicitors, and the death of Hannah E. Reynolds, administratrix of the estate of Walker Reynolds, deceased, one of the complainants in this cause, is suggested, and now comes O. M. Reynolds, administrator of the estate of Walker Reynolds, deceased, and administrator of the estate of Hannah E. Reynolds, administratrix, deceased, and on his motion leave is granted him to

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be made a party complainant as such administrator in this cause." On the 28th of September, 1891, O. M. Reynolds, administrator *de bonis non* of the estate of Walker Reynolds, deceased, moved the court "that the order or decree allowing the claim of the estate of said Walker Reynolds against the estate of said Edward Gantt for \$3,658.18, which was made by the register on, to-wit, the 30th day of December, 1886, and confirmed by this court on, to-wit, the 5th day of October, 1887, be revived in his name and favor as administrator *de bonis non* of the estate of the said Walker Reynolds." This motion was overruled by the court. The movant appeals from the decree of the court overruling and denying the motion to revive; and if an appeal is not the appropriate remedy, movant applies in the alternative for a writ of *mandamus*, to compel the court to grant the motion.

The record is very voluminous, but we have cited all that is necessary for a proper consideration of the question presented. In his return to a rule *nisi*, the chancellor states, 1st, that Hannah Reynolds, as administratrix of Walker Reynolds, was never a party to the chancery suit; 2d, O. M. Reynolds, as administrator of Walker Reynolds, is not a proper party complainant in such suit, &c.; 3d, there is no judgment or decree in favor of Hannah E. Reynolds as administratrix of Walker Reynolds, &c. There are other causes assigned by the chancellor in his return, why a peremptory *mandamus* should not issue, but we think it is unnecessary to consider them.

Whether the order of the court was proper or irregular, which required the creditors to file their claims verified, before the register, under the penalty of having them barred, upon a failure to do so, within the time specified, we need not determine. The order was made, and remains in full force, and in obedience to this order Hannah Reynolds, administratrix, filed her claim. It was reported upon by the register as a valid claim, and without exception his report was confirmed by the court.

In addition to this, Hannah Reynolds, as we have seen, moved the court to vacate the order which required the creditors to file their claims against the estate of Edward Gantt, deceased, and this motion, undetermined, is still pending before the court. If the motion is not withdrawn or waived, the party entitled to represent this claim has the right to have the motion adjudicated. Since these orders were made and proceeding had, Hannah Reynolds has died. It would be a denial of justice effected through the orders

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of the court to hold, at this stage of the case, that the claim due Walker Reynolds' estate should not be represented. It is no answer to say that there is no formal decree upon the confirmation of the register's report, which reported the correctness and validity of this claim. All necessary and preliminary proof has been taken, and the court, in its further proceedings, may yet either set aside the report of the register, and reject the claim, or make a formal decree, adjudicating the validity of the claim, and ordering its payment. The proper representative of the claim should be in court, until finally disposed of by the court. In view of the order of the court made at the March term, 1891, and quoted above, in which it is declared that "the death of Hannah E. Reynolds, administratrix of the estate of Walker Reynolds, deceased, one of the complainants in this cause, is suggested, and now comes O. M. Reynolds, administrator of Walker Reynolds, deceased, and administrator of Hannah E. Reynolds, administratrix, deceased, and on his motion leave is granted him to be made a party complainant as such administrator in this cause," we do not understand that portion of the chancellor's return to the rule *nisi*, in which it is stated that "Hannah E. Reynolds, as administratrix of Walker Reynolds, was never a party to the suit in the Chancery Court," &c. She was not one of the original parties, but was a proper and necessary party to file and prosecute the claim filed by her as administratrix of the estate of Walker Reynolds, deceased. It would seem that the record does not sustain the return of the chancellor in this respect. So long as the interlocutory orders and decrees in regard to the creditors of the estate of Edward Gantt, which have been made by the Chancery Court in the settlement and administration of the estate of Edward Gantt, remain in force, as a matter of right, and indispensable to its proper protection, Hannah E. Reynolds, administratrix of the estate of Walker Reynolds, deceased, was the proper party to represent the claim due that estate; and after her death, O. M. Reynolds, who had been duly appointed and qualified as administrator *de bonis non*, should succeed her as the proper party.

We must not be understood as deciding that, when an estate, *not insolvent*, has been removed from the Probate Court for settlement, upon the bill filed by an administrator, an order by the court requiring creditors to file their claims, verified, before the register within four months, or other specified time, not in accordance with the statutory provisions, or the same will be forever barred, is a proper order,

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or one authorized by law. Different principles may arise, when an insolvent estate is before the court for settlement, or the assets of an insolvent debtor are to be distributed among his creditors. The question is not presented at this time for consideration, and may not arise hereafter.

We will not anticipate, but refer to the following authorities, which treat of the duties and powers of the Chancery Court in the settlement of estates not insolvent: *Story's Eq. Juris.*, §§ 543, 547; 1 *Pom. Eq.*, § 156; *Lee v. Park*, 15 *Eng. Ch. Rep.* 715; *Buckle v. Atleo*, 2 *Vernon*, 37; *Ib.* 36; *Rush v. Higgs*, 4 *Vesey*, 638; *Stewart's Adm'r v. Stewart's Heirs*, 31 *Ala.* 207; *King v. Calhoun*, 5 *Ala.* 523; *Clay's Adm'r v. Gurley*, 62 *Ala.* 14.

The record shows that the claim of Walker Reynolds, deceased, consisted in a judgment recovered against Edward Gantt in his life-time. Code, § 2280, provides as follows: "When a judgment has been rendered against a decedent before his death, no execution can issue thereon against his personal representative, except in the case provided in section 2897 of the Code; nor can the judgment be revived against him, except by suit on the judgment."

It is contended by contestee of petitioner's motion, that under section 2280, *supra*, and the authorities of *May v. Parham*, 68 *Ala.* 256, and *Brown v. Newman*, 66 *Ala.* 271, a judgment can not be revived except in the manner provided in section 2280 of the Code. We do not understand that the purpose of petitioner's motion is to revive the judgment recovered in the Circuit Court against the estate of Edward Gantt in his life-time. Conceding that the Chancery Court had the authority to require creditors of Edward Gantt to file and probate their claims before the register, and to hear contest of the same, and to judicially allow or reject such claims, the question presented by the motion of petitioner is, whether the filing of the claim by Hannah Reynolds, administratrix, under the order of the court, was the bringing of a suit or action within the meaning of sections 2265 and 2603 of the Code. Under the former section it is provided, "When any action has been commenced by or against the personal representative of a decedent, the same may be prosecuted by or against any succeeding executor or administrator, who may on motion be made a party;" and by section 2603, "No action abates by the death or disability of the plaintiff or defendant, if the cause of action survives or continues; but the same must, on motion, . . . be revived in the name of or against the legal representative of the deceased, his successor or

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party in interest, . . . " &c. We are very clear these sections fully cover the case made by petitioner, and that when Hannah Reynolds, administratrix, filed her claim against the estate of Edward Gantt, deceased, as required by the order of the Chancery Court, and it was pending before that court for allowance or rejection, it was a suit or action, and that upon her death the suit might be revived on motion in the name of her successor, as provided in the statute.

We need not consider whether an appeal lies from the decree of the court allowing or rejecting a claim filed in pursuance of its own orders, as shown by the facts of the case. See *Thornton v. Highland Ave. & B. R. Co.*, 94 Ala. 353, and authorities cited. Under the view we take of the case, after the death of Hannah Reynolds, there was no one in court to represent the claim due the estate of Walker Reynolds, deceased, and consequently no one who could prosecute an appeal. The order granting leave to O. M. Reynolds to become a party complainant, without more, did not make him a party in fact.—*Ex parte Sayre*, 69 Ala. 184. It is evident from the return of the chancellor to the rule nisi, he does not regard O. M. Reynolds, administrator, a proper party for any purpose. The claim due the estate of Walker Reynolds is before the court. Since the death of Hannah Reynolds, administratrix, it is without a representative, and must abate, unless revived in the name of her successor. The statute provides this may be done by motion. The record shows that O. M. Reynolds, petitioner, is her duly appointed successor. He has moved the court to revive the action in his name as provided in the statute. The motion was denied by the court. He has no remedy against this error, except that furnished by the writ of *mandamus*. *Ex parte Ware*, 48 Ala. 223.

A peremptory writ will be awarded commanding him to grant the motion of petitioner.

Mandamus granted.

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*Bill in Equity for Foreclosure of Mortgage, or Deed of Trust;
Cross-Bill for Cancellation of Conveyance.*

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95	579
135	305
95	579
141	176

1. *Transactions between parties occupying fiduciary relations towards each other.*—The general principle which a court of equity applies to transactions between persons occupying fiduciary relations towards each other, is not confined to cases in which there is any formal or technical fiduciary relation, such as guardian and ward, parent and child, client and attorney, &c., but extends to all cases in which confidence is reposed by one party in the other, and the trust is accepted, under circumstances which show that the confidence was founded on the intimate personal and business relations existing between the parties, which gave the other party an advantage or superiority; and in such cases, the *onus* is on the party in whom the confidence is reposed to show that no fraud, undue influence, or other improper motive entered into the transaction, but that it was the voluntary act of the other party, fully understood by him, and his understanding of it fully expressed in the writings which he signed.

2. *Same; case at bar; conveyance cancelled.*—In this case, the instrument assailed by the grantor, an old woman in feeble health, by which she conveyed all her property to the grantees, wealthy men engaged in active business pursuits, in trust that they should take charge of the property, collect the rents, make necessary repairs, pay taxes out of the rents collected, and pay the residue to the grantor during her life, was set aside and cancelled at her instance, on evidence showing that, although they had not solicited her to make any conveyance of her property to them, they were her intimate friends, whom she consulted in all business affairs, and who represented to her, at the time when she signed the conveyance, that it bound them to support and maintain her during life, while in fact it only bound them to apply the surplus income of her own property, after payment of repairs and taxes, to her support.

3. *Same; ratification.*—When the grantor in a written instrument, which conveys all her property to the grantees in trust, partly, for her support and maintenance, files a bill to set it aside, her receipt of money for her support from the grantees, pending the suit, does not conclude her as a ratification of the instrument, when it appears that her necessitous circumstances compelled the acceptance of the money, one of her receipts stating, "I take this money because I am starving."

FROM the Chancery Court of Etowah.

Heard before the Hon. S. K. McSPADDEN.

The original bill in this case was filed on the 8th February, 1887, by Wm. H. Denson as trustee, and R. B. Kyle and Sam. Henry, claiming to be the owners and beneficiaries, and sought to foreclose a mortgage, or deed of trust in the

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nature of a mortgage, which Daniel Liddell and wife had executed to secure a debt due to W. J. Perdue. Said W. J. Perdue died before the filing of the bill, having devised and bequeathed all of his property to his wife, Mrs. Augusta E. Perdue; and she was made a defendant to the bill. Kyle and Henry claimed to be the owners of the mortgage under a conveyance executed to them by Mrs. Perdue, which was made an exhibit to the bill; and Denson, the trustee, filed the bill at their instance, and in their interest. Liddell and wife made no defense, and a decree *pro confesso* was entered against them by consent. After the reversal and remandment on the former appeal (87 Ala. 423-30), Mrs. Perdue filed an answer and cross-bill, assailing the validity of her conveyance to Kyle and Henry, and asking its cancellation. Said conveyance was in these words:

"State of Alabama, Etowah County: This indenture, made this 9th day of August, 1886, between Augusta E. Perdue, of the State and county aforesaid, of the first part, and R. B. Kyle and Sam. Henry, of said county and State, of the second part, *witnesseth*, that whereas the said Augusta E. Perdue, being in feeble health, but of sound mind, and unable to look after and care for her property, and being desirous of having her property cared for during her natural life, and to make provision for her comfort and welfare during her natural life, and for the further purpose of disposing of my property, real, personal and mixed, and having the utmost confidence in my friends, R. B. Kyle and Sam. Henry; now, therefore, in consideration of the sum of one dollar in hand paid by the said R. B. Kyle and Sam. Henry, the receipt of which is hereby acknowledged, hath this day bargained, sold, released, conveyed and confirmed, and by these presents doth bargain, sell, release, convey and confirm, unto the said R. B. Kyle and Sam. Henry, all my property, real, personal, and mixed, together with the tenements, hereditaments, and appurtenances thereunto belonging, and the reversions, remainder, rents, issues and profits thereof; also, all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, in the above described property; to have and to hold, unto the said R. B. Kyle and Sam. Henry, and their assigns forever; in trust nevertheless, and upon the uses and purposes hereinafter mentioned, namely, first, to take charge of said property, take, collect and receive the rents, issues and profits thereof, and out of the proceeds to keep the said premises in good order and repair, and to pay all charges, taxes and assessments that may be imposed thereon, and pay the residue to

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Augusta E. Perdue during her life. And the said Augusta E. Perdue do by these presents hereby stipulate, and it is hereby understood, that at and after the death of the said Augusta E. Perdue, the property above mentioned shall revert to the said R. B. Kyle and Sam. Henry, in fee simple, and in equal shares; and for and in consideration of valuable services rendered to me by the said R. B. Kyle and Sam. Henry, and the further sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, I do hereby grant, bargain, sell and convey to the said R. B. Kyle and Sam. Henry all my property, real, personal or mixed, that I may die seized or possessed, together with all the tenements, hereditaments, and appurtenances thereto belonging; to have and to hold to the said R. B. Kyle and Sam. Henry, in equal shares, and to their assigns forever, less one-eighth of an acre each to be given to Ellen Anderson and Bookie Whorton. And the said R. B. Kyle and Sam. Henry are charged with the duty of, and are hereby fully authorized to lay off to Ella Anderson one-eighth of an acre of land, including the building now occupied by her, and one-eighth of an acre of land to Bookie Whorton, including the building now occupied by her, and to execute deeds in fee simple to each of them for said land; and I hereby revoke all other arrangements, either verbal or written, as to the disposition of my prpoerty. In witness whereof, I have hereunto set my hand and seal, the day and date above written. Erasures on the 19th and 20th lines of second page made before signing." (Signed by Mrs. Perdue, under seal, attested by two subscribing witnesses, and admitted to record as a deed, December 7th, 1886, on proof by one of the subscribing witnesses.)

On final hearing on pleadings and proof, the chancellor dismissed the original bill, and rendered a decree for Mrs. Perdue under her cross-bill, setting aside the conveyance to Kyle and Henry. They appeal from this decree, and assign it as error.

WM. H. DENSON, for appellants. (No briefs on file.)

DORTCH & MARTIN, and A. E. GOODHUE, *contra*.

WALKER, J.—The original bill in this case was filed for the foreclosure of a mortgage, the ownership of which was claimed by the appellants, R. B. Kyle and Sam. Henry, under a certain instrument alleged by them to have been executed by Mrs. Augusta E. Perdue on the 9th day of

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August, 1886. The case was in this court at a former term, on appeal from a decree sustaining demurrers to the bill. It was then held that, so far as the title to the mortgage and the right to sue on it were concerned, the instrument was not testamentary in character, but operated as a deed. It was decided that the demurrers had been improperly sustained.—*Kyle v. Perdue*, 87 Ala. 423. After the remandment of the cause, Mrs. Perdue interposed an answer and cross-bill, wherein she denied the rights set up by Kyle and Henry under the instrument of August 9, 1886, and asked that it be cancelled, on the grounds (1) that her signature to it was made at a time when she was physically and mentally incapable of transacting business of any kind, so that in signing the instrument she knew nothing of its contents or of its import; and (2) that in the alleged execution of said instrument she did not act freely and understandingly, but that her signature to the same was procured by the fraud and undue influence of Kyle and Henry who had long been her confidential friends and business advisers and as such had great influence over her which they abused by getting her to convey all her property to them at a time when she was prostrated by a serious illness and when she did not understand the terms or effect of the instrument which she signed. That instrument can not stand if either of the above mentioned grounds of attack upon it is sustained by the evidence.

The testimony of several witnesses, whose credibility does not seem to be affected by any improper bias, tends strongly to show that on the 9th of August, 1886, Mrs. Perdue was in no condition, mentally or physically, to attend to the disposition of her property. Two colored women who waited on Mrs. Perdue during her sickness describe her condition at and about the time the paper was signed as one of extreme illness. It appears from their testimony that she was physically helpless, was out of her head, and was unable to transact any business. Mrs. Hosmer, who was a near neighbor of Mrs. Perdue and was present when the instrument in question was signed, describes her as completely prostrated mentally and physically at that time, and says that her mind was not then strong enough to enable her to know and understand the business she was engaged in. Mr. Mower, a minister of the Protestant Episcopal Church, states that he had known Mrs. Perdue since 1850, and was for many years a friend of her deceased husband, who was a minister of the same church. He testifies that as minister he called to see Mrs. Perdue on the day the paper was signed,

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and that at that time her mind was seriously impaired, and that she was neither mentally nor bodily in a condition to attend to any business relating to the disposal of her property. Mr. Dortch, an attorney, states that on Sunday, the 8th of August, 1886, he was asked by R. B. Kyle to go to Mrs. Perdue's residence, Kyle stating that Mrs. Perdue wanted to dispose of her property and wished the witness to draw the papers. Mrs. Perdue was found in a condition of such prostration that the business was postponed until next day. On the next morning Mr. Kyle again asked the witness to go to Mrs. Perdue's residence. The witness refused to go, at the same time telling Mr. Kyle that he had determined not to go back there as it was his judgment and opinion that Mrs. Perdue was unable to dispose of her property, and that he would have nothing to do with drawing the papers. There was other evidence to support the allegation that Mrs. Perdue was at that time physically and mentally unfit to attempt the transaction of business. On the other hand, the witnesses introduced by the defendants to the cross-bill, including the physician who regularly attended upon Mrs. Perdue during her sickness, stated that she was competent to transact business and that she was able to understand the instrument when she signed it. We are thus confronted with irreconcilable conflicts in the testimony upon the issue as to Mrs. Perdue's mental competency at that time.

In considering the evidence bearing upon the charge that Mrs. Perdue, in signing the instrument, was unduly influenced by Kyle and Henry who abused the confidence which she reposed in them as her trusted friends and business advisers, it is material to ascertain at the outset the truth as to the relations existing between the parties. Kyle and Henry admit that they were on terms of intimate friendship with Mrs. Perdue, but deny that they occupied toward her any relation of special trust or confidence. From their own account of this matter the following state of facts is disclosed: Kyle and Henry were men of wealth actively engaged in business pursuits. For many years prior to his death they were intimate personal friends of Dr. Perdue who was a clergyman and a school-teacher. He frequently advised with them as to his business affairs. His means were invested in a residence in Gadsden, in railroad stocks and bonds, and in notes and mortgages. He had no children, and bequeathed all his property to his wife. A few weeks before his death he told Mr. Henry that he wanted him to look after and care for his wife. This conversation

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Henry repeated to Mrs. Perdue after her husband's death. After she became a widow both Henry and Kyle frequently advised her in regard to her business affairs. She had such confidence in them that she requested them to use money she had on hand and pay her interest on it, as she preferred that disposition of it to any other investment. To satisfy her each of them accepted some of her money in this way, giving their notes and paying the interest as accrued. The box containing her valuables was kept in Mr. Henry's vault. He attended to getting the securities which her husband had left her transferred to her name and looked after collections for her. She was an old woman, and it is plain that she regarded Kyle and Henry as her trusted friends, and that she was in the habit of applying to them for advice in all business matters or troubles, and that they advised and assisted her whenever the occasion to do so was afforded. She had been quite ill for several weeks when, on August 8th, 1885, Mr. Kyle called to see her in response to a message to the effect that she wished to see him on business. When he entered her room she said that she wanted to see him about her business. In the course of the conversation she said that she was very sick and wanted to arrange her business before she got worse. She did not on that occasion state what disposition she wished to make of her property, but requested Mr. Kyle to bring Mr. Dortch to draw the papers. Kyle returned with Mr. Dortch during the afternoon of that day. At that time Mrs. Perdue was greatly prostrated and stated that she was unable to attend to the business. She requested Mr. Kyle to bring Mr. Henry with him when he came again. Henry states that on the morning of August 9, Kyle said to him that Mrs. Perdue wished them to come to her house, that she wanted to make some disposition of her property. They accordingly went to her house that morning. Mr. Dortch having refused to go with them they decided to take another attorney. The attorney who accompanied them had never spoken to Mrs. Perdue before that day. When her attention was called to his presence and he spoke to her she asked him if he was a lawyer. Both Kyle and Henry say that when they went to Mrs. Perdue's residence that morning they did not know what disposition she proposed to make of her property. From their own version of the circumstances attending their visit it is plain that they understood that Mrs. Perdue wished to make some disposition of her property and that she desired them to be present to see that the business was properly attended to. Mr. Henry says that when the instrument which she

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signed was read over to her she asked him if it was right. She sought and relied upon his advice as she had often done before. In considering the transaction then had between Mrs. Perdue on the one hand and Kyle and Henry on the other, due regard should be had to their attitude towards her as shown by their previous relations with her and by the circumstances which led to their presence in her house on that occasion.

There are well established rules to be applied in passing upon transactions between persons whose relations are such as to suggest that in dealings between them confidence is reposed and accepted to such an extent that one of them is subject to the influence or ascendancy of the other. When such a relationship is shown to exist if the one who was in a position to exert the influence claims the benefit of a contract with the person bestowing the confidence, the burden is cast upon the former to show affirmatively that the influence of his position was not unduly exerted, that the utmost good faith was exercised, and that all was fair, open, voluntary and well understood. This rule as to the burden of proof is of familiar application to contracts by which benefits are conferred by a *cestui que trust* upon his trustee, by a ward upon his guardian, by a child upon his parent, by a client upon his attorney, by a patient upon his physician, or by any one upon his priest or spiritual adviser.—*Noble v. Moses*, 81 Ala. 530; *Dickinson v. Bradford*, 59 Ala. 581; *Malone v. Kelly*, 54 Ala. 532; *Boney v. Hollingsworth*, 23 Ala. 690; *Johnson v. Johnson*, 5 Ala. 94; *Marx v. McGlynn*, 88 N. Y. 357; *Huquenin v. Baseley*, 2 Leading Cas. in Eq., (W. & T.) 1156. The relations here mentioned are but instances in which the principle is applicable. It is not essential that any formal or technical relationship of a fiduciary character has been established between the parties. It suffices that they stand in such a relation to each other that, while it continues, confidence is justifiably reposed by one, and the influence which naturally grows out of that confidence is possessed by the other. When the parties are merely friends of each other and deal upon terms of equality, the burden of showing the invalidity of any transaction between them is upon the one who assails it. But where their situation is such that as a matter of fact confidence is reposed on one side and there is superiority on the other side resulting from the influence acquired by the acceptance of the confidence bestowed, there is a presumption of undue influence to be rebutted by the superior party. Transactions between such persons may be entirely valid, but the

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one who is in a position to influence the other must show that the duty which he assumed by the acceptance of the confidence has been fully performed.—*Voltz v. Voltz*, 75 Ala. 555; *Shipman v. Furniss*, 69 Ala. 555; *Waddell v. Lanier*, 62 Ala. 347; *Ferguson v. Lowery*, 54 Ala. 510; *Cowee v. Cornell*, 75 N. Y. 99; *Billage v. Southee*, 9 Hare, 534; *Tate v. Williamson*, L. R. 2 Ch. 55; Kerr on Fraud and Mistake, (Bump's Ed.) 183; 2 Pomeroy's Eq. Juris., §§ 956, 963; 8 Amer. & Eng. Ency. of Law, 647-654.

In the present case it appears from the testimony of the beneficiaries in the instrument which is assailed that the grantor therein had long been in the habit of seeking and relying upon their advice and assistance in reference to her business affairs; that the circumstances leading to their visit to her on the occasion when the instrument was signed were such as to make it plain that she looked to them to see that the disposition of her property which she desired was properly made; and that by the arrangement which she then suggested and to which they fully assented they formally assumed the position of trustees of all her property with powers implying her unlimited confidence in their fidelity to her interests. It does not often happen that any of the familiar relations of a fiduciary character between adults beget in fact more of trust and confidence than the statements of Messrs. Kyle and Henry show that they were the recipients of on the occasion in question. We are satisfied that it is incumbent upon them to show that Mrs. Perdue signed the instrument voluntarily, deliberately and advisedly, with full knowledge of its nature and effect; that there was an absence of all undue influence, advantage, or imposition; and that they did not in any way mislead her as to the meaning or operation of the paper prepared for her signature.—*Balkum v. Breare*, 48 Ala. 75; *Jackson v. Harris*, 66 Ala. 565; *Haydock v. Haydock*, 34 N. J. Eq. 570; *Gillespie v. Holland*, 48 Am. R. 1; *Baker v. Monk*, 4 DeG., J. & S. 388, and authorities cited *supra*.

Mr. Kyle states that Mrs. Perdue said to Mr. Henry: "I wanted to see you and Col. Kyle about the disposal of my property. They want me to give it to the church, but I do not want to do it. I know what I want to do with it. I want you and Col. Kyle to take charge of all my property and take care of me while I live, and when I die I want you to pay all my debts, if any, and put a tomb-stone like the one over my dear husband's grave over my grave, and then I want the balance of my property divided equally between you and Col. Kyle, reserving to Bookie and Zebbie the lots

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set apart to them. Can I do it? Col. Henry replied very promptly, 'You certainly can, madam, if you desire to do it.' " Henry says: "When I went into her room I went up to her bed. I asked her how she felt. After answering me she told me that she had sent for Mr. Kyle and me, that she wanted to give him and me everything she had in trust. That we were to look after her business and attend to her business. I wont be certain what other words she used. She said that she wanted to give it to me and Kyle square out, the property to be held by us during her life in trust for her support. This is all that I recollect now that she said before the paper was written." As to what occurred when the paper was signed, he says: "Capt. Cunningham read over the paper to her. She remarked that she wanted to give Kyle and me the property in trust. She seemed not to have grasped the idea of its being given in trust in the paper. It was then re-read to her. She then asked me if that was right, and I told her if what she told me just before the paper was written was right, it was. She then took pen in hand as above stated;" and also, in reply to an inquiry as to what explanation was made by Cunningham: "The explanation given by him was that she gave her property to Kyle and Henry, but that they were to have it for her support." Henry called to see Mrs. Perdue after her recovery and she then asked him as to the contents of the instrument which she had signed during her illness. He testifies: "I told her that in the paper she had given everything she had to Kyle and me. That we were to look after her and support her and have the property in trust for that purpose, and that in the paper she authorized us to make a deed each to Bookie and Zeebie of an eighth of an acre each with the houses where they lived. She asked me then if the interest on her papers would not support her, or if she was to get sick again, how was she to be provided for? I told her that it was Kyle's and my duty under the deed to take care of her and support her." It is plain from the testimony of both Kyle and Henry that they understood that, by accepting the benefit of the instrument, they became bound to provide for the support of Mrs. Perdue during her life, without regard to the sufficiency of the income to be received by them from her property. They are careful to state that the money and supplies which they have furnished her were from their own means and were not derived from the trust estate.

The instrument which was signed by Mrs. Perdue does not provide for such a disposition of her property as the

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statements of Kyle and Henry show was proposed and was understood to be effected. There is nothing in the instrument to impose upon the grantees any duty to care for or support the grantor during her life; they are only required to pay her so much of the income from the property as may be left after deducting all expenses for repairs and for all charges, taxes and assessments. No provision is made for the payment of the grantor's debts, or for the erection of a tomb-stone over her grave. The trust for her support during her life does not extend to the property conveyed but only to the income therefrom. Yet the trustees do not intimate that they understood that her claim upon the trust estate for a support was to be limited to the income. That, however, is the extent of the provision in her favor. The effect of the instrument which was prepared and signed is that Mrs. Perdue strips herself of all beneficial interest in her property except as to the net income therefrom during her life, and that the grantees do not undertake to contribute one cent to her support either from their own means or from the corpus of the trust estate. If Mrs. Perdue signed the instrument on Henry's assurance that it was right and that it conformed to her directions, it is plain that she acted under an entire misapprehension of its real meaning and effect. A comparison of the contents of the instrument with the statements by Kyle and Henry as to what was proposed and understood leads inevitably to the conclusion that in signing the instrument Mrs. Perdue did not understand its contents. Henry's own statement shows that he misled her, whether he intended to do so or not. The grantees acquired greater benefits than were intended to be conferred, and they did not assume the obligations to which they consented. The disposition of property which Messrs. Kyle and Henry say Mrs. Perdue expressed a desire to make was not effected by the instrument which she signed after being assured by Henry that the paper conformed to her directions. If that instrument is allowed to stand the grantees thereby acquire all of the grantor's property of every description without becoming liable to secure to her the substantial advantages which were contemplated to be provided for in her favor by the arrangement which was proposed. The testimony of the grantees themselves shows that the grantor never intended to make such a disposition of her property as is embodied in the instrument which she signed. In view of the relations of trust and confidence existing between the parties, and of the evident reliance by the grantor on the false assurances of one of the grantees,

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an instrument, the provisions of which fall so far short of the grantor's understanding of its operation in her favor can not prevail against her impeachment of it. The result is that, accepting the version of the transaction as detailed by the parties who assert its validity, it must upon their own statements be pronounced invalid. It is, therefore, unnecessary to pass upon the conflicts in the testimony upon the issue as to Mrs. Perdue's mental competency at the time she signed the instrument.

It is urged that by accepting money and supplies from Kyle and Henry Mrs. Perdue ratified the invalid instrument. It is plain that she had no intention to ratify it. She was asserting its invalidity in the courts. Her adversaries, by the active assertion of their claim, had succeeded in cutting her off from the enjoyment of the income from her property. She received their contributions toward her support during the pendency of this suit, and while she was under the stress of want, caused by the withdrawal of her accustomed means of livelihood. On one of the receipts which was presented for her signature she wrote, "I take this money because I am starving." Receipts given in such circumstances are entitled to no weight as evidence of a free consent to confirm the voidable transaction. The evidence by no means shows that the alleged acts of ratification were free, voluntary and well understood.—*Voltz v. Voltz*, 75 Ala. 567; *Thompson v. Lee*, 31 Ala. 392; *Butler v. Haskell*, 4 Dessau. (S. C.) 651; 2 Pom. Eq. Jur., § 964. 2.

We discover no error of injury to the appellants in the decree of the Chancery Court.

Affirmed.

Thornton v. Tison.

Bill in Equity by Judgment Creditors, to set aside Conveyances as Voluntary and Fraudulent.

1. *Parties to suit for distribution and settlement of trust fund; decrees in favor of persons not parties of record.*—Any number of the beneficiaries of a trust fund may maintain a suit to bring the trustee to a settlement, without joining the others; and any judgment creditor may file a bill to set aside a fraudulent conveyance executed by his debtor, without joining other creditors as complainants with him; and the court may, in either case, render decrees in favor of persons who are not named as complainants in the bill.

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2. *Jurisdiction of Federal courts, as affected by amount in controversy and residence of parties.*—When a bill is filed in the Circuit Court of the United States, to compel a settlement and distribution of a decedent's estate, the value of the estate is the amount in controversy, and a decree may be rendered in favor of each distributee for his share, though less than \$500; and if some of the complainants are non-residents, it is immaterial that other distributees are not.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 12th July, 1890, by Mrs. Elizabeth Tison and Mrs. Martha L. Agee, distributees of the estate of John Shackelford, deceased, on behalf of themselves and other distributees of said Shackelford's estate, and as judgment creditors of R. H. Abercrombie, the administrator of said estate, and of R. J. Thornton, the surety on his administration bond; against said R. J. Thornton, R. L. Thornton, and Annie T. Hudman, who was a daughter of said R. J. Thornton. The complainants claimed to be judgment creditors of said R. J. Thornton, under and by virtue of a decree rendered by the Circuit Court of the United States at Birmingham, under a bill filed by some of the distributees against the administrator and Thornton as his surety, to compel a settlement and distribution of the estate; and they sought to avoid and set aside two conveyances executed by said R. J. Thornton to said R. L. Thornton and Annie T. Hudman. The deed to Annie Hudman was dated April 24th, 1888, and was executed pending the chancery suit in the Federal court; and the consideration expressed being love and affection, the complainants sought to set it aside as fraudulent in law. The conveyance to R. L. Thornton was dated April 10th, 1887, pending said chancery suit, and recited a valuable consideration; and the complainants assailed it on the ground that the consideration was entirely fictitious, or was greatly exaggerated, and that it was executed with the intent to hinder, delay, and defraud creditors. The bill, as amended, alleged that the chancery suit in which the decrees were rendered was instituted by "said Martha L. Agee and others of the distributees and heirs at law, of said John Shackelford, who were citizens and residents of California and Arkansas;" and the transcript of the record of the decree, which was made an exhibit to the bill, showed that the amount in the hands of the administrator to be distributed, or for which he was liable, was ascertained to be \$17,234.78, and a decree was rendered in favor of each distributee for his proportionate share, the decree in favor of Mrs. Tison being for \$1,541.87, and that in favor of Mrs. Agee \$68.18.

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The defendants demurred to the bill, jointly and severally, (1) because it showed that all the distributees were not made parties to said chancery suit; (2) because decrees were rendered in favor of persons who were not parties to the suit; (3) because the decrees in favor of Mrs. Agee and others were for a less sum than the court had jurisdiction of; and (4) because Mrs. Tison and others were shown to be residents of the State of Alabama. The chancellor overruled the demurrer, and his decretal order is assigned as error.

WALKER, HEWITT & PORTER, and M. J. GREGG, for appellants, cited *Thompson v. Whitman*, 18 Wall. 457; *Wise v. Turnpike Co.*, 7 Cranch, 276; U. S. Revised Statutes, § 629; *Turner v. Bank*, 4 Dall. 8; *Gray v. Larramore*, 2 Abb. U. S. 540; *Ford v. Babcock*, 1 Denio, 158; 6 Cowen, 221; 14 Wall. 253; Foster's Fed. Practice, 104, § 60.

ALEX. T. LONDON, *contra*, cited Freeman on Judgments, § 124; Black on Judgments, § 285, notes; 12 Amer. & Eng. Encyc. Law, 272-75; *Payne v. Hook*, 7 Wall. 425; *Handley v. Stultz*, 137 U. S. 366; 129 U. S. 206; 138 U. S. 1.

STONE, C. J.—It has been long and well settled that a part, less than the whole, of the beneficiaries in a trust fund, may maintain a bill to bring the trustee to a settlement. And the same rule prevails when creditors have the right to proceed in equity to subject to their demands effects of their debtor held by an equitable title, or fraudulently attempted to be placed beyond the reach of his debts. In such cases, it is not necessary that all the beneficiaries or creditors shall be made complainants. A part may proceed to coerce a settlement of the trust, or the utilization of the fund or effects in the liquidation of his or their demands; and in the one case must, while in the other he or they may, so frame the bill and proceedings as that the entire litigation and the entire administration may be had and accomplished in one suit. This, because in the settlement of a trust, in which there are many beneficiaries, the court will not, as a rule, administer partial relief, but will take the entire account and distribute the entire fund. For this purpose the suit, in legal effect, is instituted. It results that, in many cases, decrees for their respective distributive shares are rendered in favor of many persons who are not named as complainants in the bill. And the same thing frequently occurs in what are known as creditors' bills.

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Brown v. Bates, 10 Ala. 432; 3 Brick. Dig., 340, § 136; *Bank of St. Mary's v. St. John*, 25 Ala. 566; Sto. Eq. Pl., §§ 97, 99, 100, 104, 105; *Lehman v. Meyer*, 67 Ala. 396; *Payne v. Hook*, 7 Wall. 425.

When a suit is instituted, and rightly instituted, in either of the categories stated above, there can be no question that any decree rendered within the purview of the bill, although in favor of a person not named as a party complainant, is a binding personal judgment in the particular case. And we do not hesitate to hold that, in the suit in the Circuit Court of the United States, every individual decree rendered, irrespective of its amount, and irrespective of the fact that the person in whose favor it was rendered was or was not a party complainant in that suit, has all the elements of a personal judgment against the defendants in that cause.—*Johnson v. Waters*, 111 U. S. 640.

In the said suit of *Agee et al. v. Abercrombie, adm'r et al.*, in the U. S. Circuit Court, the sum ascertained to be in the hands of the administrator *de bonis non* for distribution was in excess of seventeen thousand dollars. That was the amount in controversy in that suit, and not the separate sums decreed to the several distributees. That litigation was a single suit, not a multiplicity of suits between the several next of kin and the administrator *de bonis non*. *Handley v. Stutz*, 137 U. S. 366.

Affirmed.

Williams v. Costello.

Action for Breach of Contract.

1. *Check or order of third person as payment.*—Where plaintiff, desiring to purchase an overcoat, procured an order for one from a third person, and presented it to the tailor to whom it was addressed, who thereupon took it, and promised to make the overcoat; but, the drawer of the order having failed in business before the coat was finished, refused to deliver it without payment; *held*, that the plaintiff could not recover for a breach of contract, unless the evidence showed that the order was accepted as payment for the debt.

APPEAL from the Circuit Court of Jefferson.
Tried before the Hon. JAMES B. HEAD.

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B. M. ALLEN, for appellant.

MARTIN & McEACHIN, *contra*.

COLEMAN, J.—The case was tried by the court without the intervention of a jury, and the court rendered judgment for the defendant.

It appears from the evidence that plaintiff was indebted to the Western Union Telegraph Company in the sum of thirty dollars, and that the Age Publishing Company was indebted to him in a similar amount. On October 31, 1888, the Age Company, by its agent, gave an order upon the defendant "to make an overcoat for Ed. E. Williams [plaintiff], not to exceed thirty dollars, on *Age* account." The price agreed upon for the coat was \$32.50. The coat was made, but defendant refused to deliver it to plaintiff without the payment of the purchase price. The plaintiff insisted that the defendant accepted the order of the Age Company for thirty dollars as so much cash, and in absolute payment to that extent for the coat. The defendant controverted this statement, and insisted that the order was not taken as an absolute payment *pro tanto* for the coat.

Parties *sui juris* can make such contracts as they see proper, provided they do not contravene some statute or public policy. *Prima facie* a debt is payable only in money, but by agreement a debt may be made payable in any kind of property of value. The burden to prove that the creditor agreed to accept anything other than money, rests upon the debtor. The mere acceptance by the creditor from his debtor of a check on a bank, or the obligation of a third person, *without more*, will not be regarded as other than a conditional payment. It requires proof to the effect that the parties understood and agreed that the check or property should be received as a payment, and that it was so accepted, before it will be considered that the check or property was received in absolute payment of the debt. *Born v. First Nat. Bank*, 123 Ind. 78; 18 Amer. St. Rep. 312; *Holmes v. Briggs*, 131 Penn. St. 233; 17 Amer. St. Rep. 804; *Bank v. Buchanan*, 10 St. Rep. 617; *Caldwell v. Hall*, 49 Ark. 508; 4 Amer. St. Rep. 64; *Lowery v. Murrell*, 2 Porter, 280; *Carriere v. Ticknor*, 26 Ala. 575; *Lee v. Fontaine*, 10 Ala. 755; *Pearson v. Thomason*, 15 Ala. 700.

Again, Williams, the plaintiff, can have no greater interest in the overcoat, or claim against the defendant, than the Age Publishing Company would have, if, instead of directing the overcoat to be made for Williams, the order had directed

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the overcoat to be made for the Age Publishing Company. Such an order, and its acceptance, does not import that the coat, when completed, is to be delivered without payment. The legal effect of the order is, that the Age Publishing Company will be responsible for the payment in money; and the legal obligation to pay is not varied, because the order specified that the coat was to be made for a third person, on account of the Age Publishing Company. Both contemplate a payment in money, and under either view the defendant was entitled to retain the coat until he was paid. We think the presumption of law, and the weight of the evidence, are in favor of the defendant; and we agree with the conclusion of the trial court, that the plaintiff was not entitled to recover.

Affirmed.

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Lady Ensley Furnace Co. v. Rogan & Co.

Garnishment in aid of Pending Action.

1. *Indebtedness accruing between service of garnishment and answer.* A garnishee is required to answer as to his indebtedness, not only at the service of the garnishment, and at the time of making his answer, but also during the intervening period (Code, § 2946), even though the writ or citation does not so state; and being required to make further oral answer, this liability continues until final judgment against him or discharging him.

2. *Claim of exemption by debtor to indebtedness admitted by garnishee under continuing contract.*—When a garnishee admits an indebtedness under a continuing contract of employment, which either party has a right to terminate without notice at the end of any month, and a claim of exemption is thereupon interposed by the debtor, the claim extends only to the indebtedness then existing; and an oral answer being required, if the garnishee then admits a further indebtedness under the contract, as modified from time to time, and a new claim of exemption is then interposed, this claim can not retroact on payments made during the intermediate period.

APPEAL from the Circuit Court of Colbert.

Tried before the Hon. H. C. SPEAKE.

On the 13th June, 1889, Rogan & Co. commenced an action by summons and complaint against Jarius Collins, and sued out a garnishment in aid of the action against the Lady Ensley Furnace Company, a private corporation, as the debtor of said Collins. The garnishment required the

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garnishee to answer "what they are indebted to said defendant at the time of the service of this writ, or at the time of making their answer, and whether they will not be indebted in future by a contract then existing;" and it was served on the garnishee on said 13th June, 1889. On the 19th September, 1889, the plaintiff obtained a judgment by default against Collins for \$132.28, and a judgment *nisi* was entered against the garnishee for want of an answer. On the 22d February, 1890, Collins filed in court, with the clerk, his claim of exemption, claiming among other things the debt due to him by the garnishee. On the 3d March, 1890, the garnishee filed a written answer under oath, admitting an indebtedness at that time of \$150. At the same term, on March 19th, an order was entered, at the instance of the plaintiff, requiring the garnishee to answer orally at the next term, and the cause was continued. At the next term, the garnishee answer orally, by its authorized agent, that Collins had been in the employment of said company continuously from January, 1889, at stipulated wages payable monthly; that either party had the right to terminate the contract at the end of any month, without notice to the other; that the wages were paid at the end of each month, and the amount was several times changed; that a new contract was not made at the end of each month, but the defendant "just went on as before;" and that the several sums thus paid him, after the service of the garnishment, aggregated \$1,847.50. At the same term, the defendant filed a second claim of exemption, claiming that his monthly wages, which he had received and spent, were exempt, and specifying other personal property aggregating about \$613 in value. On these facts, the court rendered judgment against the garnishee, for the amount of plaintiff's judgment, with interest; and this judgment, to which the garnishee excepted, is here assigned as error.

JAMES JACKSON, for appellant.—The garnishment did not require the garnishee to answer as to any indebtedness intervening between the service of the writ and the answer, and any such indebtedness was outside of the issue.—Code, § 2974; Drake on Attachments, 6th Ed., §§ 451, 667.

J. B. MOORE, *contra*, cited Code, § 2946; *Archer v. People's Savings Bank*, 88 Ala. 249; *Craft & Co. v. L. & N. Railroad Co.*, 93 Ala. 22.

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WALKER, J.—The writ of garnishment in this case required the garnishee to answer what it was indebted to the defendant at the time of the service of the writ, or at the time of making its answer, and whether it would be indebted in future to him by a contract then existing. The service of the garnishment created a lien in favor of the plaintiff, upon any debt of the garnishee to the defendant which might be disclosed by the answer, or on a contest thereof.—Code, § 2957. The citation did not in terms require an answer as to the time intervening the time of serving the garnishment and making the answer, and in this respect it did not follow the language of the statute.—Code, § 2946. Its manifest purport, however, was to require the garnishee to answer as to any indebtedness which was existing at the time the writ was served, or which may have accrued when the answer was made, or which might become due in the future under a contract then existing. A writ of garnishment is mere process, and it serves its purpose when it brings the garnishee before the court.—*Curry v. Woodward*, 50 Ala. 258. Any indebtedness of the garnishee to the defendant which accrued between the dates of the service and of the answer was fairly within the scope of the questions propounded, and a payment of such debt by the garnishee before making his answer can not be permitted to have the effect of withdrawing it from the lien of the writ. The garnishment entitled the plaintiff to have such debt appropriated to the satisfaction of his judgment against the defendant, if it should be disclosed at any time while the proceeding was pending.

The writ of garnishment was served June 13th, 1889. On March 3d, 1890, a written answer was filed for the garnishee. During that term of the court the plaintiff obtained an order requiring the garnishee to answer orally in the presence of the court. This order was not complied with until during the September term, 1891. If the original answer of the garnishee had disclosed the facts as to the relations existing between it and the defendant, the plaintiff would have been entitled to a continuance of the garnishment, and to require the garnishee to make further answers. On the oral examination of the secretary and treasurer of the garnishee, it was developed that the defendant was an employe of the garnishee from the date of the service of the writ until March 1st, 1891, and during that time was paid for his services more more than eighteen hundred dollars. By the terms of the contract under which the services were rendered, the defendant had the right to quit at the end of

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any month without notice, and the garnishee had the right to discharge him without notice. The salary was payable at the end of each month. Changes were made July 1st, 1889, February 1st, 1890, and July 1st, 1890, in the amount of compensation to be paid the defendant. With these exceptions, no new contracts were made, but the defendant simply continued to work under the existing contract, and was paid at the end of each month when a debt had accrued in his favor for services rendered during that month. During all that time he was working under successive continuing contracts, each of which was in force for several months. A true answer at any time during that period would have disclosed a contract upon which in the future an indebtedness from the garnishee to the defendant could accrue. In such case, it was proper that the garnishee should be kept before the court, so that any debt actually becoming due and payable to the defendant could be subjected to the satisfaction of the plaintiff's demand.—*Security Loan Association v. Weems*, 69 Ala. 584; *White v. Hobart*, 90 Ala. 368. The order for an oral examination kept the garnishee before the court; and any payment by him on a debt accruing to the defendant during the pendency of the garnishment proceedings was at his risk, and could avail nothing against the plaintiff.—*Archer v. People's Savings Bank*, 88 Ala. 249. The writ operates to intercept the amount becoming due on a debt of the garnishee to the defendant while the proceeding is pending, and, unless such amount is paid into court by the garnishee, to render him liable therefor, to the extent of the plaintiff's demand, until he is discharged, or until the lien of the writ is released by a claim of exemption successfully interposed by the defendant.—Code, § 2979.

The first claim of exemption filed by the defendant in this case covered only that part of the indebtedness disclosed by the first answer of the garnishee. The order requiring a further answer in open court kept the writ operative, so as to subject any other indebtedness which accrued between the dates of the service of the writ and the final answer thereto. The oral answer disclosed an indebtedness, over and above that admitted in the original answer, which exceeded the aggregate of the plaintiff's demand and the amount which the defendant could then claim as exempt. The claim of exemptions then filed could not retroact, so as to have the same effect as if successive claims of exemptions had been interposed to cover and protect the indebtedness to the defendant as it became due and

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was paid at the end of each month of his service. No such claims of exemptions were in fact interposed. The claim of exemptions last filed could cover only so much of the debt which was subject to the lien of the garnishment as would suffice to make up the difference between the value of the other property claimed as exempt and the amount which the law allowed the defendant to claim in this mode. There was no error in condemning so much of the excess as was required to satisfy the judgment in favor of the plaintiff.

Affirmed.

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Mobile & Birmingham Railroad Co. v. Worthington.

Action for Damages by Contractor against Railroad Company.

1. *Bill of exceptions not signed in term time, nor within time then allowed.*—When a bill of exceptions is not signed in term time, nor within the time then allowed by order of court for its preparation, but the transcript contains what are called "Judge's orders extending the time" from day to day, which purport to be signed by the presiding judge, though not a part of the record proper, nor made a part of the bill of exceptions, the bill will not be stricken from the record on motion.

2. *Bill of particulars; relevancy of evidence under.*—When plaintiff claims damages of the defendant railroad company for a breach of contract in refusing to let him build certain trestles which he had agreed to build, and in failing to furnish the necessary timber and materials within the time specified, whereby he "was delayed and put to great expense and trouble in the maintenance of necessary teams;" the bill of particulars, furnished on demand, containing items for "corn, oats and bran consumed," it is permissible for plaintiff to prove that it was necessary and proper to have teams for use on the work.

3. *Objection and exception to "each sentence" of letter.*—When objection is made and overruled to the admission of a letter as evidence, and objection is then made "to each sentence of said letter separately," the latter objection is but a repetition of the general objection to the whole letter.

4. *Letter or declarations of third person as evidence.*—Plaintiff claiming damages of a railroad company for not letting him do work which he had contracted to do, and in other particulars connected with the work done, and the defense being that he was only a sub-contractor under another person, with whom the company had settled in full; a letter written by that person to him, saying, "They paid it without regard to you, ignoring you except as a sub-contractor, and it leaves your claim for changing work and giving you more expensive work to

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do as it stood before," is not admissible as evidence for plaintiff, though it might be admissible against him.

5. *Declarations as part of res gestæ.*—A witness testifying as to a settlement made by him with the officers of a railroad company, for work done by him under contract, in which work plaintiff claimed to be also interested as a contractor, may state what he told the railroad officials as to his contract with plaintiff, and as to the extent of his authority to represent plaintiff in the settlement; such declarations being part of the *res gestæ*, and admissible as original testimony.

6. *Giving bond as part of contract; evidence as to.*—When a material issue is whether plaintiff performed work for the defendant railroad company as an original contractor or as a sub-contractor under another person, the defendant may prove the fact that he gave no bond for the faithful performance of the work, bonds being required of contractors, and of them only.

7. *To what witness may testify.*—The chief engineer of a railroad company, testifying as to work done by plaintiff on railroad trestles, whether as original contractor or as sub-contractor under one P. being the question at issue, may use these expressions: "This contract was given to him by P. at my special instance, and because of my previous negotiations with him; the amount of work done by him for P. on the trestles is the identical amount of work he would have done for the company if the company had contracted directly with him instead of P., as he did all the framing that was done on the trestles." Also, "At all events, the entire claim is erroneous, . . . and, from an engineering stand-point, is preposterous."

8. *Relevancy of evidence as to contract vel non.*—The question at issue being whether plaintiff, in performing work on railroad trestles, was an original contractor with the railroad company or a sub-contractor under one P., the defendant may prove the fact that, during the performance of the work, he received instructions and directions from P. without objection.

9. *Publication for bids as evidence of contract vel non.*—Where plaintiff sues for the breach of an alleged contract with a railroad company for the construction of trestles, and the defendant denies that any contract was ever consummated between them, the publication for bids for the doing of the work, signed by the chief engineer, is admissible as evidence for either party: for the plaintiff, as showing that the approval of the contract by the president of the company was not required; and for the defendant, as showing that security was required for the prompt and faithful performance of the work, which plaintiff had never given.

10. *Charge as to validity of verbal contract.*—In an action for a breach of contract which, under the law or the express agreement of the parties, was required to be in writing, a charge instructing the jury that "a verbal contract is as valid and binding as a written one" would be reversible error; but, where there is evidence tending to show a waiver of the stipulation by the party for whose benefit it was intended, such a charge is misleading only, and subject to explanation, but does not constitute reversible error.

11. *Costs of bill of exceptions.*—The bill of exceptions in this case purporting to set out substantially all the evidence, though no charge was given or asked as to the effect of the evidence, and being held unnecessarily long, the cost of copying it was equally divided between the parties, though the judgment was reversed and the cause remanded.

[Mobile and Birmingham R. R. Co. v. Worthington.]

APPEAL from the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

This action was brought by Charles M. Worthington against the appellant railroad company, to recover damages for the breach of an alleged contract by which plaintiff agreed and undertook to construct certain trestles for the defendant on the line of its road, at stipulated prices, but was delayed and hindered by defendant in the performance of the work, and was not permitted to do the work embraced in his contract; and he also claimed, under the common counts, compensation for extra work done and materials furnished. The plaintiff contended, and himself testified, that he had made a contract for doing the work on specified terms with W. M. Patton, the chief engineer of the railroad company; while Patton, as a witness for the defendant, denied that any contract between them had ever been consummated, and testified that, in consequence of the negotiations between them not being completed, he had induced one Putnam, another contractor, to give plaintiff the same work which he would have done under his own contract, and that plaintiff thus worked as sub-contractor under Putnam. The plaintiff offered in evidence the proposals for bids to do the work, as published in the Mobile papers in August, 1886, over the signature of said Patton as chief engineer, which were in these words: "Proposals will be received until noon of August 31st, for the repairing of the road-bed of the old Alabama & Grand Trunk R. R. between Mobile and the Tombigbee river and Jackson, Ala. . . . Plans and specifications can be seen on and after August 21st. Proposals may embrace the whole work, or any part of it. Sufficient security to secure the prompt and proper execution of the work will be required, and the right to reject any and all proposals is reserved." It was not shown that plaintiff had ever given, or offered to give, security for the proper execution of the work; and the defendant offered evidence tending to show that his embarrassed financial circumstances were an obstacle to the consummation of the proposed contract with him.

It was shown that said Putnam had made a settlement with the railroad company for the work done under his contract, and it was a controverted question whether this settlement embraced plaintiff's claim, or how far he was authorized to bind plaintiff. The plaintiff offered in evidence, in this connection, a letter written to him by Putnam soon after that settlement, dated March 22d, 1888, and in these words: "I succeeded in getting to a settlement with the

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R. R. people finally. They cut down more than I wished to stand, but I thought it better than a suit. In the items which I drew from your account they paid me \$3,290, which I place to your credit. They paid me on account of the work, and I will send you a statement upon what accounts they paid. They paid it without regard to you, ignoring you except as a sub-contractor. I am sorry that I could not get more out of them. The item for taking out the timber to construct new work should have been made out differently, and charged per thousand for the whole amount, say \$5.00 per M. on such sum as you think it worth. I tried to get them to allow that price per M. on 250,000 B. M. It leaves your claim for changing contract and giving you more expensive work to do as it stood before." The defendant objected and excepted to the admission of this letter as evidence, and to the admission of each separate sentence.

The assignments of error, 70 in number, embrace many other rulings on evidence, with numerous charges given and refused, but the opinion of this court renders a further statement of the facts unnecessary.

The appellee submitted a motion to strike out the bill of exceptions, because it was not signed within the time prescribed by the order of the court. This motion was founded on these facts: by an order of court entered on the 26th November, 1890, three days before the final adjournment, sixty days after the adjournment were allowed for the preparation of the bill of exceptions, but the bill was not signed until the 20th March, 1891. But the clerk has also copied in the transcript what are entitled "Judge's orders extending time for signing bill of exception;" and these orders, three in number, were each signed by Judge Semmes, marked *filed* on the day of their respective dates, and extended the time as follows: from the 7th January, for 30 days; from the 27th February, until the 15th March; and from the 15th March, for five days longer. The bill of exceptions fills 70 pages of the transcript, and purports to set out "substantially all the evidence;" and this was made an additional ground for striking it out, as the general charge on the evidence was not asked.

GAYLORD B. CLARK & F. B. CLARK, for appellant.

GREG. L. & H. T. SMITH, *contra*.

STONE, C. J.—The motion to strike the bill of exceptions from the transcript must be overruled. The act of Febru-

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ary 22, 1887—Sess. Acts, 126—which provides that the court in term time may fix the time within which bills of exceptions may be signed, contains the further clause, that “the judge in vacation may, for good cause, extend the time fixed in term time;” but in no case to allow more than six months beyond the adjournment of the term at which the case is tried. The statute is silent as to the manner of showing or authenticating the judge’s order of extension. Whenever, as in this case, the clerk embodies in the transcript what purports to be a copy of the judge’s order of extension, we think it our duty to regard and treat it, at least, as *prima facie* correct.

The main purpose of this suit by Worthington was to recover damages of the railroad company for the breach of an alleged contract. Worthington claims to have been a bridge-builder, and that he made a contract with Patton, the chief engineer of the road, to construct three trestles at and near certain named streams, to be crossed by the railroad’s track. The complaint contains a special count setting forth the alleged terms of the letting; avers that although plaintiff “has at all times been ready and willing to comply with all the provisions of said contract on his part, and has so complied so far as he has been permitted so to do by the defendant, the defendant has failed to comply with the following provisions thereof.” The complaint then assigns five several breaches, and among them the following: That “it has wholly failed and refused to furnish to the plaintiff the larger portion of said work, . . . and refused to permit him to perform the same . . . It wholly failed to furnish the said timber and material, at the time it had contracted to so furnish the same, and thereby postponed and delayed the plaintiff, and put him to great expense and trouble in the maintenance of necessary teams, and the maintenance and compensation of laborers. . . . It wholly failed and refused to furnish to the plaintiff the necessary timber and material to enable him to perform the large portion of the work specified in the contract.” The plaintiff also claimed that he had been permitted to do, and had done, some of the work contracted to be done, and had done other work outside of the contract which had been received: and the complaint contains common counts for the purpose of recovering for such work done.

The defendant demanded a bill of particulars under the statute, and one was furnished. Testimony was offered to prove that teams were necessary to do the work set forth in the complaint; and it was objected to as not specified in the

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bill of particulars. The objection was overruled, and the testimony received; and this raises the first question we need consider.

It is assigned as part of one of the breaches of the special contract alleged to have been made, that defendant had put plaintiff "to great expense and trouble in the maintenance of necessary teams." There was some proof that teams were a necessary power in raising large timbers in the construction of trestles of the height here required. True, there was no testimony tending to show that seventeen yokes of oxen were needed, but the record presents no ruling on that question. The bill of particulars gave notice of items of "corn, oats and bran consumed," for which compensation was claimed. These were suitable food for teams.

The question propounded for and to plaintiff as a witness in his own behalf was as follows: "Explain whether or not it was necessary or proper to have teams up there to do anything on the work?" Objected to, because not specified in bill of particulars; objection overruled, answered affirmatively, and exception reserved. We think there was nothing in this exception. Defendant had sufficient notice of this claim to prevent him from being surprised.—Code of 1886, § 2670; *Robinson v. Allison*, 36 Ala. 525; *Fountain v. Ware*, 56 Ala. 558.

Plaintiff offered in evidence a letter written by Putnam to himself, bearing date March 22, 1888. Defendant objected, and the objection was overruled; the court remarking that it was permitted to be put in evidence, "as it might tend to show whether or not Worthington knew that Putnam was making any settlement with the railroad company." Defendant then objected to each sentence of the letter separately; this objection was overruled, and separate exceptions reserved. The letter was read in evidence. Reserved as this exception was, it is probably our duty to treat it as a general exception to the whole letter.—*Mayberry v. Leach*, 58 Ala. 339.

The most important issue of fact in this case, as developed in the pleadings and testimony, was whether Worthington had an independent contract with the railroad company to build the trestles, or whether he did what work he is shown to have done under Putnam's contract, or by permission of Putnam. Worthington testified that he made and concluded an independent contract with Patton, the chief engineer, to construct the three trestles. The special count in the complaint is framed on that basis, and claims damages for not being permitted to do the work. Patton denied making

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such contract with Worthington, and claimed that the only contract he concluded was with Putnam. In making settlements with Putnam, he and his successors recognized him as contractor, and refused to recognize Worthington as a contractor, save as an employe under Putnam. On the issue of original contract *vel non* with Worthington, his testimony and that of the engineer were in direct conflict. It is claimed by the parties to these opposing versions that they were severally more or less corroborated by other testimony. This was purely a question for the jury.

In settling with the railroad officials for work done under his contract, Putnam testified that he was not authorized to agree on a binding settlement of Worthington's claim, but was authorized to receive any amount the authorities would pay him for work done by the latter. Some moneys on this account were paid to, and received by Putnam; and he testified that he subsequently accounted to Worthington for such collections. The witnesses were not agreed as to the nature of Putnam's settlement, whether it was entirely on his own account as contractor to build the trestles, or in part as the representative of Worthington under the latter's independent contract. Extra work, not embraced in any original contract, had been done by Worthington, and there was no dispute about Worthington's right to be paid for that. The point we are now considering has nothing to do with the claim for such extra work.

Presented before the court and jury as the issue of fact above stated appears to have been by the testimony, it may be that Putnam's letter to Worthington of March 22, 1888, would have been competent evidence for the defendant, if offered by it. It was not competent evidence for the plaintiff, and should have been excluded.

What Putnam testified he told the railroad officials while settling with them, in relation to his contract with Worthington, and the extent of his authority to represent him, was part of the *res gestae*; was original testimony, and rightly received, without any special predicate being laid for its introduction.

Patton, the engineer, on being asked whether a bond had been given by Worthington, answered, "Worthington never gave any bond or security to the company, because they were only demanded where contracts were made, and no contract was ever made with him." His testimony had been taken by deposition. This answer, on motion of plaintiff, was excluded from the jury, and defendant excepted. In this we think the City Court erred. Whether he had given a

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bond or not was a circumstance the jury should know and consider in determining whether there had been a concluded contract, or mere negotiation looking to the formation of a contract. The balance of the answer had been previously deposed to by Patton, and it was no error to repeat it. Nor was it improper to state as fact that the company required bonds from contractors only.

The witness Patton gave two answers, each of which, on a separate motion of plaintiff, was stricken out, and exceptions severally reserved. The answers were as follows: (1.) "This contract was given to Worthington by Putnam at my special instance, and because of my previous negotiations with Worthington. The amount of work done for Putnam by Worthington on the trestles is the identical amount of work that he would have done for the company, had the company contracted directly with him instead of with Putnam for the framing, as he did all the framing that was to be done on the trestles." (2.) "But, at all events, the entire claim is erroneous, if it pertains to the construction of the Bigbee River, Bassett's and Lewis' Creek trestles, or any part of them, as the entire work of those trestles was done under contract with Putnam, as far as the railroad company was concerned; and even Putnam himself would have no claim to these items. The claim is, from an engineering stand-point, preposterous."

Patton was the chief engineer at the time the contract was let out. If Worthington was an original contractor, he made his contract with Patton, and no one else. He, Patton, testified that he negotiated with Worthington about the work, price per thousand feet was concurred in, but that no contract was consummated. (As to what constitutes a binding contract, see *Rutledge v. Townsend*, 38 Ala. 706.) He testified further, that when he let the contract to Putnam, he requested him to give to Worthington the construction of these trestles. In the first answer above he simply reiterated the manner in which he had said Worthington obtained the job on the trestles, and he then added that Worthington had done all the work on the trestles which he would have done, if he had himself become the contractor with the company. There was certainly nothing illegal in this. It was all, in form, a statement of fact, although, to some extent, a collective statement. This is permissible, and, to avoid prolixity, frequently desirable.—*Pollock v. Gantt*, 69 Ala. 373; *Elliott v. Stocks*, 67 Ala. 290. The second answer was but a repetition of the statement that the railroad's contract was with Putnam, not Worthington, with

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the superadded statement, as an engineer and expert, that a particular item, for which a separate charge was made, was improper, whether the work was done by Putnam or Worthington. The City Court erred in each of these rulings.

As we have said, an important issue in this case was, whether Worthington was an independent contractor, or a sub-contractor under Putnam. The witness Slaughter had, for a time, had some agency, or supervision, in connection with the erection of the trestles. In answer to a proper question, he testified, "I certainly recollect he [Putnam] was giving him [Worthington] instructions." He was then asked this question: "Did Mr. Worthington make any, and if so, what objections, in your presence, to Putnam giving him instructions or directions about the manner of doing pile-work at Lewis' Creek, and about the manner of his doing the superstructure on that pile-work, the framing of the trestles?" On objection from plaintiff, the witness was not allowed to answer this question, and defendant excepted. This was error. If Worthington submitted to direction and control at the hands of Putnam, it was, at least, a circumstance to be weighed by the jury in determining whether he was working under independent contract, or under Putnam.

The publication for bids was competent testimony for either party. For the plaintiff, in that it gave no notice that contracts, to be binding, must first be submitted to, and approved by the president of the railroad. For the defendant, in that it notified the bidders who were induced by it to make bids, that "sufficient security to insure the prompt and proper execution of the work will be required." The answer to this question ought to have been received.

We consider it unnecessary to notice any other exceptions to rulings on testimony.

The court affirmatively charged the jury, at the instance of plaintiff, "that a verbal contract is as valid and binding as a written contract." There were also two charges requested by defendant, and refused, to the effect that there was not sufficient evidence in this case to authorize the jury to find a contract was made with Worthington to build the trestles.

It was certainly one of the terms of the advertised letting, that the contractor should give "sufficient security to insure the prompt and proper execution of the work." If, at the time of the interview between Patton and Worthington, that, or any other term of the contract, was left

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open for future agreement or action, then no contract was completely made and agreed on, and could not be, until Worthington executed the required security, or tendered its execution. Even if the negotiation had progressed so far that the terms were all agreed on, and Worthington was promised the job on his giving the required security, this would preclude him from maintaining an action for a breach of the contract, unless within a reasonable time he executed, or offered to execute said security.

This provision of the offer was inserted for the benefit of the railroad, and it was competent for that party to waive it. We can not affirm, as a matter of law, that it was not waived. We therefore hold that the plaintiff's failure to prove that the security was given or tendered was, at most, a circumstance to be weighed by the jury, in determining whether a concluded contract was agreed on with Worthington.

Whenever, under the terms of the law, or of the agreement made, a writing is necessary to complete the contract, or to make it binding, it would be error to charge the jury that "a verbal contract is as valid and binding as a written one." But, inasmuch as security could have been waived in this case, the only criticism the charge is subject to is, that it did not take in all the bearings of the question. It may have presented a proper case for an explanatory charge, but the giving of it was not a reversible error. There is nothing in any of the charges given or refused which calls for a reversal.

For the erroneous rulings on the admission of evidence, pointed out above, the judgment of the City Court must be reversed.

Reversed and remanded.

PER CURIAM.—The bill of exceptions in this transcript is unnecessarily long. Let the judgment show that the appellee is taxed with only half the cost of copying the bill of exceptions in the transcript. The other half must be paid by the appellant.

[Louisville and Nashville R. R. Co. v. Morgan.]

Louisville & Nashville Railroad Co. v. Morgan.

Action on Contract for Personal Services.

1. *Contract for services in recovering stolen property.*—Under a contract between the superintendent of a railroad company and a detective officer, by which the former promised to pay the latter the reasonable value of his services in the discovery and prosecution of persons who had stolen goods from the cars of the railroad company, and the recovery of the goods; a recovery can not be had on evidence showing that the goods recovered belonged to another railroad company, and that the thieves were convicted of larceny from the cars of that other company.

APPEAL from the Circuit Court of Jefferson.
Tried before the Hon. JAMES B. HEAD.

HEWITT, WALKER & PORTER, for appellant.

COLEMAN, J.—This is an action in assumpsit under a contract of employment for personal services. The parties differ as to some of the material stipulations, but agree in an important statement as to the inducement which led to the formation of the contract. The plaintiff, Morgan, testified as follows: "I went to Mr. Newbold, superintendent of the Louisville & Nashville Railroad Company, and told him I had caught on to some stealing from the Louisville & Nashville cars; and he said, if I would go to work on the case, he would pay me what it was worth." Mr. Newbold testified: "In September, or August last, the plaintiff came to me, and stated that he had caught on to some stealing from the Louisville & Nashville Railroad cars, and asked me what I would be willing to do about it. I told him, if he caught anyone stealing from our cars, and restored the property to us, and it was identified, and if he caught the thieves and got them convicted, I would pay him what was reasonable."

The material difference as to the terms of the contract, as stated by the contracting parties, consists in the plaintiff's claim to compensation for services rendered, without reference to the result of the services to be performed, while the defendant insists that the compensation depended upon the recovery and restoration of the property, and the

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conviction of the thieves by the plaintiff. Whether the one or the other gives the true version of the contract, in this respect, it is evident that both understood the contract of employment was entered into with reference to a larceny from the Louisville & Nashville Railroad cars. This is manifest not only from the statement of both witnesses, but, as confirmatory of this view, the plaintiff called upon the defendant's agent to indentify the recovered property. There is nothing in the record which would authorize the conclusion that Newbold, the superintendent of the Louisville & Nashville Railroad Company, would have employed the plaintiff to work on a case of larceny from the cars of the Georgia Pacific Railroad Company. We have examined the record very carefully, and we find no satisfactory evidence to show that the goods recovered were stolen from the cars of the defendant. It is clear that the parties arrested by plaintiff were tried and convicted of burglary of the cars of the Georgia Pacific Railroad Company. It is not pretended that any of the goods recovered were taken from the cars of the defendant, except two pairs of shoes; and the proof shows, without serious contention, that the box of shoes delivered by the Georgia Pacific Railroad Company to the defendant, in which were shoes of a similar brand to those stolen, was checked short when delivered to the defendant, and an exception for the shortage was made against the Georgia Pacific Railroad Company, at the time of the delivery of the box of shoes. If this evidence be true, and we find nothing in the record which conflicts with it, or which would justify us in discrediting it, the plaintiff has failed to lift the burden which the law imposes upon every suitor, to prove his case.

We do not see how the letter of Newbold of Sept. 17th, 1890, in any way in its legal effect is at variance with the contract as testified to by him.

We think the grounds of objection to the question, "State what goods, if any, he identified," not tenable, and there was no error in overruling the objection. The plaintiff applied to the superintendent for a proper person to identify the property, who referred him to another. This person took the plaintiff to Mr. Weaver, who was at work at the freight depot, as the proper person to make the identification of the property, and Weaver's own testimony shows he was the proper person.

A part of the evidence of the plaintiff, as to what Weaver said, was mere hearsay; and if it had been objected to at the proper time, no doubt would have been excluded, or it

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might have been introduced upon a proper predicate as contradictory or impeaching evidence.

We do not think the evidence, as it is stated in the record, authorized a judgment for the plaintiff.

Reversed and remanded.

Williams v. Harper.

Petition to set aside Allotment of Homestead Exemption.

1. *When appeal lies.*—When a homestead exemption has been allotted to a decedent's widow, and a petition is afterwards filed to set it aside, an appeal does not lie from an order of the court dismissing the petition *ex mero motu*, the record not showing that any one appeared, or was notified to appear and contest it.

APPEAL from the Probate Court of Calhoun.

Heard before the Hon. EMMETT F. CROOK.

SAVAGE & COLEMAN, for appellant.

WALKER, J.—The appellant, as one of the heirs of James Harper, deceased, made a motion in the Probate Court of Calhoun county to have set aside and declared null and void certain proceedings had in that court at a previous term, which purported to effect an allotment of exemptions out of the estate of said decedent to his widow, Lodusky Harper. There is nothing in the record to indicate that notice of that motion was served on the widow, or that she appeared to resist it. An order was made, however, overruling the motion. The appeal is from that order. The record fails to show that any citation or notice of appeal was issued or served upon any adverse party (Code of 1886, §§ 3631 and 3634), and no appearance is entered in this court by or for any one as appellee. There is not before this court any adverse party against whom judgment could be rendered in the event of a reversal.—*Miller v. Parker*, 47 Ala. 312. The proceeding has been purely *ex-parte* throughout. Under our statute, no appeal can be maintained without an appellee. The appeal must be dismissed, because of the absence of a necessary party.

Appeal dismissed.

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Bill in Equity to have Absolute Conveyance declared Mortgage, and for Account and Redemption; Cross-Bill for Foreclosure.

1. *Sale under decree of foreclosure; personal decree for balance of debt.* Under a decree for the foreclosure of a mortgage, if the proceeds of sale of the mortgaged property do not satisfy the decree in full, the mortgagee is entitled to a personal decree for the unpaid balance (Code, § 3605); but, if the decree is satisfied in full, he can not have a personal decree for a balance reported in his favor by the register under the statement of an account between the parties relative to matters outside of the mortgage.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 2d March, 1885, by Thomas Perdue, against Brooks Brothers individually, and as partners; and sought principally to have a conveyance of land, which was an absolute deed in form, declared a mortgage, and for an account and redemption under it; also, to have another mortgage which the complainant had executed to one Crenshaw, and which said Crenshaw had assigned to Brooks Brothers, declared satisfied and cancelled; and for other relief not material to the questions now presented. The deed was dated January 20th, 1883, signed by said Perdue and wife, and conveyed a tract of land containing two hundred acres, on the recited consideration of \$538; and at the time it was executed, and as part of the same transaction, Brooks Bros. gave a written instrument to Perdue, by which they promised, "when the above advanced money is repaid to them, they were to deed said land back to said Thomas and Nancy Perdue." This money, \$538, was advanced by Brooks Bros. to Perdue in a check drawn in favor of one Carr, who then held a mortgage on the land for \$400, the balance (\$138) being the accrued interest; and on the delivery of the check to Carr, and the payment of a small balance of \$38.00, which he claimed, and which Brooks Bros. also advanced for Perdue, he delivered up the mortgage, and it was cancelled on the record. On the 15th February, 1883, Perdue executed to J. J. Crenshaw a crop-lien note and mortgage, conveying his crop for the year 1883,

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with mules, horses, &c., as security for \$400 made in advances; the note and mortgage maturing on the 1st October, 1883. On the 30th October, 1883, Brooks Bros. advanced to said Crenshaw, at the instance of Perdue, \$432.44, as the amount due on said mortgage, and took an assignment of it to himself; and on the same day Perdue ordered a cancellation on the record of the agreement to re-convey, above stated, which Brooks Bros. had executed to him on the 20th January, 1883. On the 18th February, 1884, the parties had another settlement or agreement, but its terms do not fully appear; at which time, Perdue gave his note for \$194 to Brooks Bros., purporting to be "for rent of land," and they executed to him a writing in these words: "Whereas, Thos. Perdue is indebted to Brooks Bros. in the sum of \$1,164.44, amount due on land; now, therefore, if the above amount is paid, including any amount that may be due for supplies from Brooks Bros. the present year, the said Brooks Bros. agree to deed to said Thomas and Nancy Perdue the 200 acres of land bought of them January 20, 1883; but, should they fail to comply with the above, then this agreement to be void."

On these facts, the complainant asked that his deed to Brooks Bros. be declared a mortgage, and that he be allowed to redeem on payment of any balance due, which he offered to do, but denied that anything was due; and he claimed that the several notes, which purported to be given for rent, were in fact given for usurious interest, and that the mortgage to Crenshaw was fully paid and satisfied. The defendants claimed in their answer that the original contract for the mortgage to Carr was a purchase of the land, and by cross-bill asked a foreclosure of the mortgage to Crenshaw; and they contended that the agreement of February 18th, 1884, was without consideration, and was only intended to give the complainant another opportunity to re-purchase his land.

After the reversal of the case on the former appeal (85 Ala. 459), the court having rendered a decree declaring each party entitled to relief, and ordering a statement of the accounts by the register, he reported that the amount due on the mortgage to Carr was \$343.24, the amount due on the Crenshaw mortgage \$630.40, and that there was an additional balance due from Perdue to Brooks Bros. of \$331.43, which seems to have been composed of family supplies, &c., advanced by them during the year 1883-4. This report was in all things confirmed, and a decree was rendered ordering a sale of the property under each mortgage unless the balance

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due thereon was paid within a specified time. At the next term, the register reported that the complainant had paid the balance due on each mortgage; and the defendants then asked for a personal judgment against him for the unpaid balance of \$331.43. The court rendered a decree as asked, and this decree is here assigned as error.

WATTS & SON, for appellant.

J. C. RICHARDSON, *contra*.

COLEMAN, J.—It is an established rule of chancery practice, that to authorize relief both the *allegata* and *probata* must be sufficient, and must correspond. However full and convincing the proof as to any fact, unless the fact is averred, proof alone is insufficient.

We have examined the pleadings in this case, and especially the cross-bill, and have been unable to discover any averment of indebtedness, the subject of controversy, and made a basis of relief, other than the sum of \$538.00, expressed as the consideration of the deed, and \$432.00 given for the Crenshaw mortgage, the sum of \$194.00 purporting to be for rent of land, and a small sum to be paid as balance to Carr. In stating the account originally before the register, it may have been proper and necessary to show other indebtedness of the mortgagor, to which payments were applied; but the only balance due, for which a decree of foreclosure could be rendered upon the pleadings, was for the balance unpaid of the debts secured by the mortgages. After this was done, and a final decree of foreclosure and order of sale rendered, and this decree fully satisfied, it was irregular, if not wholly without the jurisdiction of the court, to order the register to execute a reference, and state an account between the parties, as to other transactions and other indebtedness, not covered by the original or cross-bill of the case, and wholly outside of the mortgage debt.

Where, after final decree of foreclosure, payments are made, or the mortgaged property is sold, but the payments or proceeds are insufficient to satisfy the decree, it is right and proper to order a reference to ascertain how much of the decree of foreclosure remains unsatisfied, and it is for such unpaid balance of the foreclosure decree that the statute authorizes proceedings for a personal decree, or judgment which may be enforced by execution.—Code, § 3605; *Pressley v. McLean*, 80 Ala. 310; *Winston v. Brown-*

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ing, 61 Ala. 80; *Sayre v. Elyton Land Co.*, 73 Ala. 87; *Tedder v. Steele*, 70 Ala. 347.

Reversed and remanded.

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Bill in Equity by Creditor to set aside Conveyances as Fraudulent.

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99	74
95	614
129	637

95	614
138	278

1. *Transactions between corporations acting through same persons as directors.*—The directors of a private corporation, in the transaction of its business, are the agents of the corporation and its stockholders, and they can not bind it by a contract in reference to a matter in which they have an adverse personal interest; and in transactions between two corporations which have adverse interests, if the same persons act as directors for each of them, either corporation may avoid the contract, without regard to the question of advantage or detriment; but the contract is only voidable at their instance, and creditors can not assail it except on the ground of fraud, though the dual relation of the directors is a circumstance to be considered in determining the good faith of the parties.

APPEAL from the Chancery Court of Etowah.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed on the 1st November, 1886, by the O'Conner Mining & Manufacturing Company, a private corporation organized under the laws of Alabama, against the Coosa Furnace Company and the Gadsden Iron Company, both Alabama corporations, the Wabash Iron Company and the Vigo Iron Company, two Indiana corporations, and against A. L. Crawford and his two sons, J. P. Crawford and A. J. Crawford. The complainant was the owner of an iron mine near Gadsden, and on the 18th December, 1882, leased said mine, with its fixtures, appurtenances, &c., to the Coosa Furnace Company for the term of ten years, the lessee undertaking to pay an annual royalty of fifteen cents per ton on all iron mined, not less than 50,000 tons annually. Claiming a breach of this contract in failure to pay the royalty, the complainant instituted an action at law against the lessee, and the action was pending when the bill in this case was filed. The Coosa Furnace Company was organized with a capital stock of \$125,000, its only stockholders being said A. L. Crawford and his two sons;

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and its works were located near the complainant's iron mine. On the 7th April, 1884, the Coosa Furnace Company executed a mortgage conveying substantially all of its property to the two Indiana corporations and A. L. Crawford, as security for debts due to each of them, which, as recited, aggregated \$125,000. On the 18th July, 1885, the Coosa Furnace Company conveyed most of the mortgaged property, by absolute deed, to the Wabash Iron Company, on the recited consideration of \$60,000; and that company, at the same time, sold and conveyed the property, on the recited consideration of \$55,000, to the Gadsden Iron Company, a new corporation organized by the Crawfords as stockholders.

The bill assailed the validity of the mortgage and of the deeds to the Wabash Iron Company and the Gadsden Iron Company, on the ground that they were executed with the intent to hinder and delay creditors, and that the consideration was simulated. The bill prayed that said conveyances be set aside, and the property be condemned to the satisfaction of complainant's debt, as ascertained by the register on the statement of an account; also, that the unpaid subscriptions of the Crawfords for stock in the Coosa Furnace Company be also ascertained, and personal decrees be rendered against them for their respective indebtedness. An amended bill was afterwards filed, alleging that the Coosa Furnace Company was insolvent when the original bill was filed; and a receiver was asked and appointed.

On final hearing on pleadings and proof, the chancellor held that the complainant had failed to make out a case for relief, but did not dismiss the bill, retaining the case for a settlement of the receiver's accounts. The complainant appeals, and assigns the decree as error.

DUNLAP & DORTCH, for appellant, cited *Morawetz on Corporations*, §§ 787, 517, 520, 525; *Cook on Stock & Stockholders*, 661, and notes; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; *Jones on Liens*, § 86; *Story's Equity*, 1252; *Bank of St. Mary's v. St. John*, 25 Ala. 566; 59 Ala. 139; *Rouse v. Merchants' Nat. Bank*, 15 Amer. St. Rep. 644.

AIKEN & MARTIN, and WATTS & SON, *contra*, cited *Globe Iron R. & C. Co. v. Thacher*, 87 Ala. 458; *Twinlick Oil Co. v. Marbury*, 91 U. S. 587; *Kelly v. Railroad Co.*, 141 Mass. 496; 135 Mass. 367; *Hurts v. Brown*, 77 Ill. 226; *Buell v. Buckingham*, 16 Iowa, 284; *Whitwell v. Warner*, 20 Vermont, 425; *Ashurst's Appeal*, 60 Penn. St. 290; 47 Conn. 47; 1 Spear's Eq. 545; *Sargent v. Webster*, 13 Metc. 497; *Gas Co. v. Berry*,

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113 U. S. 322; 19 Central L. J. 368; 2 Amer. St. Rep. 263; 66 Amer. Dec. 165; *Duncombe v. Railroad Co.*, 84 N. Y. 190; 16 N. J. Eq. 229; Field on Corporations, 196.

WALKER, J.—The bill was filed by the O'Conner Mining & Manufacturing Company as a simple contract creditor of the Coosa Furnace Company, and its principal purpose was to reach and subject to the payment of the debt claimed certain property alleged to have been fraudulently conveyed by the Coosa Furnace Company, first, by a mortgage executed on the 7th day of April, 1884, and again, as to a part of the property, by a deed of absolute conveyance executed on the 13th day of July, 1885. The specified ground of attack upon the conveyances in question is, that they were executed for the purpose and with the intent to hinder, delay or defraud the complainant, and to prevent it from enforcing collection of its just demands; and that the debts the mortgage was given to secure, and also the considerations recited in the deed, were simulated and not real. The execution of the two instruments is alleged in the bill, and is admitted in the answer. The instruments must stand, unless the particular infirmities charged against them are shown by the evidence. There are no allegations to support a contention that their formal execution by the corporation was insufficient in any particular.

The charge that the considerations recited in the two instruments respectively were simulated and not real is not sustained by the proof. The defendants proved, without contradiction, that the debts secured by the mortgage were due from the mortgagor, and represented full value received by it; and, also, that the consideration mentioned in the deed was paid in the discharge of debts which were secured by the mortgage, and that the property conveyed was not at that time worth as much as the amount of the debts in payment of which it was received. We would have to ignore the uncontroverted evidence in the case to arrive at any other conclusion on the subject than that the debts correctly represented money actually advanced to the Coosa Furnace Company and bills contracted by it.

Much stress is laid in the bill, and in the argument of counsel for the appellant, upon the relations existing between the several defendants during the time covered by the transactions which are sought to be impeached. The dealings in question were between the Coosa Furnace Company, on the one side, and the Wabash Iron Company, the Vigo Iron Company, A. L. Crawford and his two sons, Vol. 95.

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J. P. Crawford and A. J. Crawford, on the other side. It is true that each of the corporations mentioned was controlled and dominated by the Crawfords. The great bulk of the stock in each of them was owned and held by members of the Crawford family. The board of directors in each of the corporations was composed of the Crawfords and their adherents. It thus plainly appears that the transactions were between the Coosa Furnace Company and some of its own stockholders and directors, and also two other corporations having boards of directors composed of the same persons who managed and controlled the first named company.

The directors of a business corporation are its agents. Though they may not be trustees in the technical sense, yet they exercise functions of a fiduciary character. Their position implies that confidence is reposed in them. The duties which a director assumes to the corporation and to the stockholders thereof disqualifies him from binding the corporation in a transaction in which he is adversely interested. He can not at the same time act for himself and for his principal, without the full knowledge and free consent of the principal. In *Morawetz on Private Corporations*, § 528, it is said: "A person who is agent for two parties can not, in the absence of express authority from each, represent them both in a transaction in which they have contrary interests. This rule is based upon the same reason as the rule which prohibits an agent from representing his principal, when his personal interests are opposed to his duty. The principal stipulates for the judgment and skill of his agent, and the latter has no authority to act, when he is not in a position to give the principal the benefits of his best endeavors. It follows, therefore, that the directors, or other agents of a corporation, have no implied authority to bind the company by making a contract with another corporation which they also represent." If the same persons as directors of two different companies represent both companies in a transaction in which their interests are opposed, such transaction may be avoided by either company, or at the instance of a stockholder in either company, without regard to the question of advantage or detriment to either company. Both the corporations are armed with the right to repudiate such a transaction, no matter how fair and open it may be shown to be.—*Memphis & Charleston R. Co. v. Woods*, 88 Ala. 630, 641.

But the duty which disqualifies the directors from binding the corporation by a transaction in which they have an

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adverse interest, is one owing to the corporation which they represent, and to the stockholders thereof. A principal may consent to be bound by a contract made for him by an agent who, at the same time, represented an interest adverse to that of the principal. A *cestui que trust* may elect to confirm a transaction which he could have repudiated on the ground that the trustee had an interest in the matter not consistent with his trust relation. In like manner, dealings between corporations, represented by the same persons as directors, may be accepted as binding by each corporation and the stockholders thereof. The general rule is, that such dealings are not absolutely void, but are voidable at the election of the respective corporations, or of the stockholders thereof. They become binding, if acquiesced in by the corporations and their stockholders. *Kelly v. Newburyport Horse Railroad*, 141 Mass. 496; *Ashurst's Appeal*, 60 Pa. St. 290-314; *Buell v. Buckingham*, 16 Iowa, 284; *Manufacturers' Saving Bank*, 97 Mo. 38; *Alexander v. Williams*, 14 Mo. App. 13; *Twinlick Oil Co. v. Marbury*, 91 U. S. 587; *Booth v. Robinson*, 55 Md. 419; *U. S. Rolling Stock Co. v. Atlantic & Great Western R. Co.*, 32 Am. Rep. 390; *Taylor on Private Corporations*, (2d Ed.) § 630; 1 *Beach on Private Corporations*, § 247.

The directors of a corporation, in the transaction of its business and the disposition of its property, do not stand in any such relation to the general creditors of the corporation as they occupy to the corporation itself and to its stockholders. They are not the agents of such creditors, nor can they usually be regarded as trustees acting in their behalf. The creditors are not entitled to disaffirm a transfer of the property of the corporation, made by its directors or other agents, merely because the corporation itself or its stockholders could have done so. When a disposition of the property of a corporation is assailed by its creditors, they are not clothed with the right of the corporation or of its stockholders to set aside the transaction, regardless of its fairness or unfairness, on the ground that it was entered into by representatives of the corporation who had put themselves in a relation antagonistic to the interests of their principal. The right of the creditor to impeach the transaction depends upon its fraudulent character. The question in such case is, was the transaction which is complained of entered into with the intent to hinder, delay or defraud creditors? Was the property fraudulently transferred or conveyed? The mere fact that the corporation, in disposing of its property, dealt with persons who at the same time

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were charged with the duty of representing its interests, does not, by itself, render the transaction fraudulent.—*Globe Iron Roofing & Corrugating Co. v. Thacher*, 87 Ala. 458.

Where the property of a corporation is transferred to another corporation represented by the same directors, the fact of such relationship is a circumstance well calculated to arouse suspicion, and calls for a rigid and severe scrutiny in the examination of such transaction when it is assailed by a creditor. When such a relationship is shown to exist between the contracting parties, clearer and fuller proof must be given of a valuable and adequate consideration, and of the good faith of the parties, than would be required if the transferee or grantee had been a stranger. When, however, such examination is made, and such proof is forthcoming, and the result is that no fraud or unfair dealing is shown, and it appears that the transaction was not vitiated by any infirmity of which a creditor has the right to complain, then the transaction must stand, and it is as valid, as against the creditor, as if the corporation had dealt with a stranger, who was not involved in any way with the corporate representatives.

In the present case, the proof offered by the defendants shows fully, and in great detail, the circumstances connected with the dealings between the defendants, corporations and individuals. The several witnesses were subjected to rigid examinations. The considerations to support the several debts which figured in the transactions are clearly and distinctly proved. That the mortgage was given to secure debts justly due, and that the deed was executed in *bona fide* and absolute payment of a portion of such debts, in property which was not worth more than the true amount of the debts paid therewith, are facts clearly shown by testimony which is not contradicted in any way. We do not feel at liberty to discredit and reject the full and consistent versions of the matters in controversy given by several of the witnesses, merely because these witnesses were the persons in control of the several corporations which were engaged in the dealings in question. There is no prohibition against a corporation dealing with its own stockholders or directors in reference to matters in which such stockholders or directors have interests adverse to those of the corporation; or against several corporations which are controlled by the same persons, dealing with each other. Nor is there anything wrong in a corporation conveying its property as security for, or in absolute satisfaction of, obligations honestly assumed in such dealings, if such transfer involves no fraud

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upon the rights of other creditors. The evidence in this case fails to show that the conveyances which are assailed were fraudulent as charged.

It is alleged in the amendment to the bill that the Coosa Furnace Company was insolvent at the date of the execution of the mortgage, and has been insolvent ever since that time. Even if it could be conceded that the fact of insolvency, if proved, would create such a change in the relations between the directors and the creditors of the corporation as to take from the directors the right to allow one or more creditors to acquire an advantage over the others in the application of the corporate assets to the payment of debts; yet such concession could have no effect upon the result in this case, because the evidence wholly fails to show that the company was insolvent when the mortgage was made. It plainly appears that the company was insolvent fifteen months after the date of the mortgage. Its property was then worth very much less than it cost. What it was worth at the time the mortgage was executed, is not shown. It appears from the evidence that the value of furnace property is very fluctuating. The value of the company's assets at the date of the mortgage is not proved, nor is it shown that they were then worth less than the amount of the company's liabilities at that time. The inference that the company was insolvent at the date of the mortgage does not follow from the proof of insolvency more than a year afterwards. The insolvency of the company at the date of the deed does not affect the validity of that instrument, for the operation of the deed was merely to transfer, in absolute payment of a debt, property which had been conveyed as security therefor at a date when the corporation is not shown to have been insolvent.

The leasehold interest of the Coosa Furnace Company and the income from the leased property are assets of that insolvent corporation. It is shown that the Gadsden Iron Company has been receiving the output from the mines. It is not alleged or proved that the latter company has paid less for the ore than it was worth, and it is not shown that it is chargeable with fraud in the purchase thereof. The complainant, as a simple-contract creditor without a lien, is seeking to reach the output from the mines, and to subject it to the payment of its demands. Its claim in this regard is a legal demand which may be enforced by proceeding at law. There is no obstacle to hinder the complainant from reaching this property by legal process. The bill can not be regarded as a creditors' bill, supported by the equitable

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demand for a settlement of the affairs of an insolvent corporation, as it is filed in behalf of the complainant alone, and not in behalf of itself and of other creditors, and for an administration of the assets and a ratable distribution among the creditors entitled to share therein. The bill is framed under the statute authorizing a creditor without a lien to file a bill in chancery to subject property fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed.—Code, § 3544. As, in our opinion, the proof fails to sustain the charge that the transactions which are assailed were fraudulent, the conclusion is that the complainant is not entitled to relief. The decree to that effect must be affirmed.

Affirmed.

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Action by Seller against Purchaser of Goods, on Refusal to Accept.

1. *Sale of perishable goods for future delivery; inspection by purchaser.* On a sale of a car-load of oranges, to be shipped from California to the purchaser at Birmingham, Alabama, "subject to inspection, and to be received if found by him to be sound and bright, and if otherwise to be rejected;" the seller is not required to provide in the bill of lading that the purchaser has the right of inspection on the arrival of the car, nor can the purchaser refuse to receive the oranges because the railroad agent refused to let him inspect them without further orders, provided he was allowed to inspect them within a reasonable time after their delivery, to be determined by the jury on a consideration of all the facts and circumstances of the case.

APPEAL from the City Court of Birmingham.

Tried before the HON. H. A. SHARPE.

The opinion in this case states the material facts. The only matters assigned as error are, the refusal of a charge asked by the defendant, and eight charges given on request of the plaintiff. The charge asked and refused was as follows: "If the plaintiff, through its agent, W. H. Jones, agreed to let defendant examine the fruit, and not to take it unless the same was found to be sound and bright; and that the defendant, upon the arrival of the fruit, demanded the right to examine it, and the right to examine it was denied him by the railroad company; this gave the defendant the right to then refuse to take the fruit."

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The charges given were in these words: (1.) "The plaintiff had a reasonable time after the sale of the fruit, under all the circumstances, to deliver the fruit, and to allow an opportunity for inspection; and if the jury believe that the 9th May was within such reasonable time, and that the plaintiff, through Jones, on that day offered defendant an opportunity to inspect the fruit, and he refused to accept the oranges and to pay for them, then his refusal to inspect was wrongful." (2.) "If the defendant informed Jones that he would not examine the fruit, and would not accept it, because he had made other arrangements,—then plaintiff was not bound to make any further offer, or provide any further opportunity for inspection; and if the jury further believe that the reasonable time for examination after arrival had not then expired, defendant's refusal to accept the fruit was wrongful." (3.) "If, within a reasonable time after the arrival of the fruit in Birmingham, defendant was offered an opportunity to examine the fruit, and refused to do so, then his refusal was wrongful." (4.) "If, within a reasonable time after the arrival of the fruit in Birmingham, defendant was offered by plaintiff, through Jones, an opportunity to inspect the fruit, and refused to do so, or accept the fruit; then his refusal to inspect was wrongful, although the jury may further find that the railroad company had before then refused to allow an inspection." (5.) "If the jury believe from the evidence that the defendant was offered an opportunity, within a reasonable time after the sale of the fruit, to inspect it, and that he refused such offer of privilege of inspection, then his refusal was wrongful." (6.) "If the jury believe from the evidence that the defendant refused, within a reasonable time after the sale, to inspect the fruit, and said that he would not inspect or receive it, then plaintiff was not bound to make any further offer, or offer any further opportunity of inspection." (7.) "Although defendant may have demanded of Jones, plaintiff's agent, to be given an opportunity to examine the fruit, and Jones failed at that time to allow such examination without refusing to do so; yet, if within a reasonable time after such demand was made an opportunity was given to defendant to make such examination, and he refused to examine it, such refusal on his part was wrongful." (8.) "If the jury believe from the evidence that the plaintiff offered the defendant an opportunity to examine the fruit within a reasonable time after its arrival, and defendant declined to examine and take it, such refusal on his part was wrongful."

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LANE & WHITE, for appellant, cited Story on Sales, § 418; Benjamin on Sales, § 910; *Herrick v. Gallagher*, 60 Barbour; Rights, Remedies & Practice, Vol. 4, § 1833.

CABANISS & WEAKLEY, *contra*, cited 2 Benjamin on Sales, 4th Amer. ed., 1023, n. 11.

COLEMAN, J.—All the assignments of error are based upon the charges given by the court for plaintiff, and the refusal to charge as requested by defendant.

The cause of action is founded upon a contract for the purchase of a car-load of oranges, sold by appellee to the appellant, and was brought to recover the difference between the contract price and the amount realized from the sale of the oranges. The evidence shows that the fruit was sold by plaintiff, through its agent, W. H. Jones, of Birmingham, Alabama, to be shipped to the defendant at Birmingham, Ala., "subject to inspection, and to be received, if found by him to be sound and bright, and if otherwise to be rejected." The fruit was shipped from Los Angeles, California, to Birmingham, Ala.

The defense relied upon for refusing to accept the car-load of oranges is set up in the special plea of the defendant which avers, that the "plaintiff agreed by and with the defendant that the said defendant would be allowed to open said car and examine the fruit on its arrival in Birmingham, before taking or receiving the same; and defendant says, on the arrival of the said car he asked and sought permission to open the car and to examine the fruit, all of which was denied him," &c. It is not pretended that the fruit did not arrive at its destination within due time, or was not of the quality agreed to be shipped; neither is it controverted that the defendant, by virtue of his contract of purchase, had the right to examine the fruit before accepting it. The real contest is as to whether the defendant in fact was refused permission to examine the fruit, within the contemplation of the parties, and whether he was justifiable in refusing to receive the fruit.

It is proven that the car having the oranges arrived in Birmingham on the 7th of May, 1890. It is further proven that W. H. Jones, the agent of the shipper, was in Birmingham, and this was known to the defendant. It is not denied that, on the day of the arrival of the car, the defendant was notified by the agent of the railroad that the fruit had arrived, and that on the same day the defendant applied to the railroad agent for leave to examine

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the oranges, and that the railroad agent refused to permit the examination, upon the ground that the bill of lading did not authorize it. The remaining testimony is somewhat conflicting. That of the plaintiff tends to show, that on the evening of the 7th, the day of arrival of the fruit, the defendant notified W. H. Jones, the agent of the shipper, of the arrival of the fruit; that he had applied to the railroad agent to examine the fruit, and had been refused, and that he was anxious to get the fruit. The agent, Jones, then stated he would get permission; and the evidence shows that he, Jones, telegraphed immediately to the shipper, and that on the next day, the 8th of May, he received permission, and offered to the defendant permission to examine the fruit, and offered to turn it over to him; and that defendant refused to inspect the fruit, or take it, because "he was not allowed to examine it when he wanted to do so." The defendant's testimony tended to show that the offer of the agent, Jones, to permit the examination, was made on the 10th of May, and that the defendant had made other arrangements by that time. There was evidence tending to show that oranges, at that season of the year, would keep two or three weeks, and that offered by defendant tended to show that oranges, at that season of the year, were "in danger of rotting unless sold and used quickly." The bill of lading was attached to a check drawn on the defendant for the purchase-money, through a bank at Birmingham.

The evidence is sufficiently stated to test the correctness of the rulings of the court upon the charges given and the refusal to charge as requested. The purchaser was not compelled to pay the purchase-money, and thereby secure a delivery of the bill of lading and fruit, before exercising his right under his contract to inspect the fruit. We are clearly of the opinion, however, that if he had pursued this course merely to get control of the car or goods so as to make the inspection, the payment of the purchase-money, under such circumstances, and for this purpose, would not have been a waiver of the right to examine and reject the fruit, if it failed to correspond with the quality purchased.

When goods of a certain quality are to be shipped from a distance, and delivered at a designated place, subject to inspection by the buyer, and no time is fixed by the contract within which they are to be delivered, or the right of inspection to be exercised, it is understood, the law says, that a reasonable time is allowed for the delivery, and a reason-

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able time after their arrival is allowed to the buyer within which he must make the inspection. What is a reasonable time depends upon the facts and circumstances of the particular case, to be found by the jury.—Benjamin on Sales, p. 519; *Pierson v. Cook*, 115 N. Y. 539; *Diversly v. Kellogg*, 92 Amer. Dec. 13; 12 Amer. St. Rep. 831. After the buyer refused to examine or accept the goods, the plaintiff was under no obligation to continue for an indefinite time to insist upon the acceptance of the fruit by the buyer.

As we construe the charges given for the plaintiff, when applied to the evidence, they assert the law correctly. The charge requested by the defendant asserts the proposition, that if, upon the arrival of the fruit, the railroad company then denied the right of examination to defendant, such refusal on the part of the railroad gave him the right to reject the fruit. We do not understand from the contract, as stated in the evidence, that it was incumbent on the shipper to provide in the bill of lading permission to the buyer to inspect the fruit on its arrival, or that the common carrier, the agent of the shipper, had authority to grant or refuse the inspection. It was the duty of the shipper, after its arrival, within a reasonable time to see that the buyer had the opportunity, as provided in the contract, to inspect the fruit; and it was also the duty of the buyer, within such reasonable time, to exercise the right. If the shipper himself, or his agent, Jones, had denied the right, and refused the inspection, or had not provided for the inspection within a reasonable time, the buyer would have been under no duty to have repeated the demand to inspect the fruit. If such had been proven, the buyer would have been at liberty to regard the contract as rescinded. The charge refused asserts no such proposition. As a matter of law, it bases the right to reject the fruit and avoid the contract upon the bare refusal of the railroad company to permit the inspection. When referred to the evidence, the charge is also misleading, conceding that as an abstract proposition it was correct. It utterly ignores all the evidence which tends to show that, after the refusal by the railroad company, the defendant notified Jones, the agent of the shipper, that he was anxious to get the fruit, and desired to inspect it, and the statement of the agent in reply that he would telegraph the shipper for the authority, to which the defendant made no objection. If the jury believed this phase of the evidence, it tends to show that the buyer waived any right to rescind the purchase, which he might have claimed on account of the refusal of the railroad to permit the inspection. We find no error in the record. Affirmed.

[Boykin v. Persons.]

Boykin v. Persons.*Action on Common Money Counts.*

1. *Partnership and individual demands.*—In an action by the assignee of an account in favor of a partnership, the defendant can not set off a debt due to him by each of the partners individually; as where he paid a debt for which he and one of the partners were equally liable as former partners, and the other partner, on buying out his interest in the former partnership, assumed to pay his half of that debt.

2. *Appropriation of partnership assets in payment of partner's individual debt.*—One partner can not, without the authority or consent of the other, appropriate the partnership assets to the payment of his individual debt, as by agreeing to let his creditor take up partnership goods in payment *pro tanto*.

3. *Amendment of bill of particulars.*—In an action on an account for goods sold and delivered, a bill of particulars being furnished on demand, in which the account is made out in the name of plaintiff individually; if the complaint is then amended by averring that plaintiff sues as assignee of two successive partnerships with whom the account was contracted, a corresponding amendment may be made in the heading of the bill of particulars.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by F. S. Persons against F. S. Boykin. The original complaint contained only the common counts, each claiming \$80, for goods sold and delivered, money loaned, &c. The defendant pleaded, in short by consent, the general issue, payment, and set-off. A bill of particulars was furnished on demand of the defendant, in which the account sued on was made out in the name of plaintiff individually, the items specified aggregating \$80. On the trial, the evidence showing that the goods were sold to the defendant by two successive firms, Johnson & Walker, and Johnson & Persons, who were engaged in business as druggists in the city of Montgomery, the plaintiff was allowed to amend his complaint by averring that fact, and that he sued as assignee of both firms; and he was also allowed, against the objection and exception of the defendant, to amend the heading of the account as set out in the bill of particulars by showing that it was contracted with said firms, and how much with each, the various items not being changed.

The evidence on the trial showed these facts: In 1885-6, Vol. 95.

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the defendant and one Walker were engaged in the drug business together under the partnership name of M. W. Walker & Co., being equal partners; and the partnership was indebted to Arthur Stewart in the sum of about \$500, evidenced by note. The defendant sold out his interest in the partnership to J. F. Johnson, and Johnson assumed his half of the debt to Stewart. The debt to Stewart was afterwards "paid by the defendant at the request of said Johnson, and by agreement between them said Johnson was to repay the same to defendant, and was to permit him to take out as much of said debt as he conveniently could with said store." Afterwards, the defendant contracted with said partnership the account here sued on, which, on the 28th October, 1887, amounted to \$67.70. On that day the plaintiff bought out the interest of Walker in the partnership and its assets, including their account against the defendant. A new partnership was then formed under the name of Johnson & Persons, and defendant contracted with them a debt for \$12.30. Afterwards, plaintiff bought out Johnson's interest in the notes, accounts, and other assets of the firm; and he then sued on the account as the assignee of each partnership. The defendant relied on these facts under the pleas of payment and set-off, no part of the debt to Stewart having been repaid to him.

On these facts, the court charged the jury: (1.) "If only one of the firm of Johnson & Walker made an agreement with the defendant that he should pay the Stewart note and hold the same as a partnership claim against the firm of Johnson & Walker, and thereupon defendant paid off said note, he would not be entitled to claim such payment as a partnership indebtedness of Johnson & Walker; that to make such indebtedness a partnership debt, it would be necessary that both of the partners should have entered into the arrangement with the defendant." (2.) "If only one of the partners of Johnson & Walker made an agreement with the defendant that he might take goods from the store in payment of what Johnson owed or would owe him on account of the Stewart note, such arrangement would not authorize defendant to set off the account for goods against his claim for payment of said note." (3.) "Although each one of the partners of Johnson & Walker was indebted individually to defendant in a greater sum than the amount claimed in this suit, and although they were equally interested in the business of the firm, and although the same was true of the firm of Johnson & Persons; yet defendant could not set off the liability claimed in this action, or any part thereof,

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with the indebtedness due to him from either or both of said partners."

The several rulings to which exceptions were reserved are assigned as error.

DAVID T. BLAKEY, for appellant.

A. A. WILEY, *contra*.

WALKER, J.—The debt due to Stewart was contracted by the firm of M. W. Walker & Co., which was composed of M. W. Walker and the appellant's intestate, each of them having an equal interest in the partnership. The appellant's intestate sold his interest to Johnson, who agreed to assume half of the indebtedness of Walker & Co. to Stewart. The debt was paid by the appellant's intestate. For one half of the amount paid he was entitled to a charge against his former partner, Walker, on a settlement between them of their former partnership accounts. This was an individual equitable claim against Walker, his former partner, growing out of their relations and liability as partners. With this claim Johnson had no concern. As to the other half of the amount paid by the appellant's intestate on the Stewart debt, he was entitled to look to Johnson for reimbursement, because of the latter's contract with him to pay half of that debt. This was an individual liability of Johnson's, with which Walker was not concerned. The result, then, of the payment of the Stewart debt by the appellant's intestate was, that he acquired a claim against Walker because of their equal liability as partners in the firm which contracted that debt, and a wholly separate claim against Johnson, based upon the latter's contract with him individually to pay half of the Stewart debt. These were separate individual liabilities of the two persons who composed the new firm of Johnson & Walker, but in no sense did the two claims together constitute a partnership liability of that firm. The two claims were wholly distinct.

The account against the appellant's intestate for goods sold to him by Johnson & Walker was a partnership demand. Against that demand, in the hands of the appellee as assignee, the individual debts due from Johnson and Walker respectively to the appellant's intestate could not be set off, because of a want of mutuality between the demand sued on and those offered to be set off against it. Nor could Johnson, without the authority or consent of Walker, appropriate the assets of the firm to the payment of the

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former's individual debt to the appellant's intestate.—*Cannon v. Lindsey*, 85 Ala. 198; *Watts v. Sayre*, 76 Ala. 397; *Clark v. Taylor*, 68 Ala. 453. There was no error in the rulings of the court upon these questions. There was no evidence of any demand in favor of the appellant's intestate against the appellee.

The bill of particulars originally furnished to the defendant was in the form of two accounts against him in favor of the plaintiff. The amendment to the complaint informed the defendant that he was sued on two accounts; one for goods, wares and merchandise sold to him by Johnson & Walker, the other for goods, wares and merchandise sold to him by the late firm of Johnson & Persons; and that plaintiff sued as transferee of both accounts. The bill of particulars was amended simply by making the accounts in favor of the firms with which they were contracted, instead of with the plaintiff personally. There was no change in the list of the items composing the accounts. As they were originally furnished to the defendant, they correctly gave him the information to which he was entitled in response to his demand for a bill of particulars. The bill of particulars had served its purpose when it supplied the defendant with a list of the items composing the accounts.—Code, § 2670. In view of the averments of the amendment to the complaint, a change in the bill of particulars, by merely making the account stand in the name of the firms with which they were originally contracted, instead of in the name of the plaintiff, who claimed them as transferee, could not have involved any injury to the defendant.

Affirmed.

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Motion for Summary Judgment against Sheriff.

1. *Summary judgment against sheriff; in what court made.*—A motion for a summary judgment against a sheriff and his sureties, for his failure to make the money on an execution issued by a justice of the peace, must be made in the Circuit Court, when the amount of the judgment, with interest and costs, exceeds \$100; and if less than that sum, in the justice's court.—Code, §§ 3325, 3333.

2. *Same; joinder of causes of action; amendment.*—In a motion for a summary judgment against a sheriff and his sureties, for his failure to make the money on two executions issued by a justice of the peace,

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one of which was for less than \$100, there is an improper joinder of two separate and district causes of action, one of which is not within the jurisdiction of the court; but the motion may be amended, and the refusal to allow an amendment is a reversible error; and a recital in the judgment-entry, that the objections raised by demurrer "can not be cured by amendment," shows that the opportunity to amend was denied, although there is no bill of exceptions.

APPEAL from the Circuit Court of Cherokee.

The record does not show the name of the presiding judge.

This was a motion by S. M. Hood for a summary judgment against John S. Blair and the sureties on his official bond as sheriff, for his failure to make the money on two executions, or orders of sale, which had come to his hands to be executed, and which were issued by a justice of the peace, on two judgments rendered by him in attachment cases; one of said judgments being for \$60, besides interest and costs, and the other for \$100. The defendants demurred to the motion, assigning fourteen grounds of demurrer, among which were these: (1) that the court had no jurisdiction of the motion; (2) that the two cases were improperly joined in one motion; (3) that a summary judgment could not be rendered for the failure to make the money in an attachment case, or under a *vend. ex.* The court sustained the demurrer generally, and the judgment-entry recites, "It appearing that the objections raised by the demurrers can not be cured by amendment, it is considered that said motion be dismissed." There is no bill of exceptions in the record. The judgment of the court is assigned as error.

WALDEN & SON, for appellant,

J. L. BURNETT, *contra*.

WALKER, J.—A summary judgment may be rendered against a sheriff, for failing to make the money on an execution issued by a justice of the peace which by due diligence might have been made, for the amount of the execution and interest, and five per-cent. damages on the amount thereof; and the motion must be made in the Circuit Court when the amount claimed, by reason of interest or damages, exceeds the sum of one hundred dollars.—Code, §§ 3325 and 3333. Under former statutes, such judgments could not be rendered against sheriffs, for any negligence or misfeasance on their part in levying process issued by, and returnable before justices of the peace.—*Thompson v. Acree*, 69 Ala. 178. The motion in this case disclosed a state of
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facts authorizing a summary judgment against the sheriff for failing to make the money on the execution issued on the judgment for one hundred dollars. The Circuit Court was without jurisdiction to render such judgment for the failure to make the money on the execution on the judgment for sixty dollars. That matter presented a case for a summary judgment by a justice of the peace. The motion as made presents two separate and distinct causes of action, which could not be joined, and as to one of which the Circuit Court was without jurisdiction. The demurrer to the motion upon this and other grounds was properly sustained.

But the motion could have been amended so as to cure its defects. The Circuit Court erred in adjudging that the objections suggested by the demurrers could not be removed by amendment, and in dismissing the motion on that ground. A mere failure by the court to tender an opportunity to amend before dismissing the motion would not be reversible error, in the absence of any showing that the right to amend was denied.—*Mahan v. Tatum*, 69 Ala. 466. In such case, it is not made to appear that the appellant was denied a privilege to which he was entitled. There is simply a failure to show that the question as to the existence of the right was raised in the lower court. When, however, this right is expressly denied by the court, and the motion is dismissed on this ground, it sufficiently appears that the appellant was deprived of a valuable right, and this error to his injury entitles him to a reversal.

Reversed and remanded.

Elyton Land Co. v. South & North Ala. Railroad Co.

Statutory Action in nature of Ejectment.

1. *Railroad company's right of way; nature of title.*—Land acquired by a railroad company for its right-of-way, whether by condemnation proceedings or by purchase or grant from the owner, is its private property, though charged with a public use; and the public can not claim any interest in it, as in lands dedicated to the public use.

2. *Estoppel by chancery decree, and by deed.*—In 1871, the Elyton Land Company, owning the lands on which the prospective city of Birmingham was located, subject to the right-of-way which the Alabama & Chattanooga Railroad Company had secured through them,

96	631
98	409
98	631
117	408
119	122
119	126

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and desiring to induce other companies to make their roads center there, entered into a contract with said A. & C. company and the South & North Alabama Railroad Company, whose road, as located, would run through or near said city; by which contract, said E. L. Company bargained, sold and conveyed to said two railroad companies a strip of land several hundred feet wide, and extending over 4,000 feet along each side of the right-of-way of said A. & C. road, for railroad purposes, on condition that they erect their depots, machine-shops, &c., in Birmingham, and that they give, grant and convey "to the first two railroad corporations constructing their roads from their terminus to said city" a part of said land, not exceeding one-fourth each, for the construction of their depots, &c.; and on the further condition that a certain portion of said tract, of designated size, "be appropriated and used forever as a general passenger depot for all railroads entering said city, with right-of-way to same; and with the further condition that a strip of the land, 35 feet wide, lying on each side of the right-of-way of the A. & C. company, "shall be held by the said party of the first part [E. L. Co.] forever as a perpetual right-of-way for all railroad companies doing business in and through said city." On the 30th April, 1872, the Elyton Land Company conveyed to the S. & N. Ala. Railroad Company, a strip of land for a right-of-way, but with a proviso, "that any other railroads running into or through the city of Birmingham shall have the right to run a parallel track along and upon the same right-of-way." In March, 1881, the Elyton Land Company filed its bill in equity against the S. & N. Ala. Railroad Company and the Ala. Great Southern Railroad Company, the latter being the successor of the A. & C. Railroad Company; alleging that the S. & N. Ala. company had partially, if not substantially, accepted the terms and conditions of said agreement of April, 1871, by the construction of its road, the erection of buildings, &c., and that the other railroad companies had failed to comply, and had thereby forfeited all rights under said agreement of April, 1871, which, as the complainant insisted, was revocable on that account; and therefore praying that all rights granted by said agreement to the other railroad companies be divested, but reserving the rights thereby granted to the S. & N. Ala. Railroad Company. Decrees *pro confesso* being duly entered against the two defendant corporations, a decree was rendered in accordance with the prayer of the bill, revoking, annulling and declaring void the said agreement of April, 1871, as to the A. & C. company, the A. G. S. company, and all other railroad companies except the S. & N. Ala. company, whose rights were reserved and confirmed. Afterwards, the E. L. Company conveyed to the S. & N. Ala. R. R. Co., for railroad purposes, a part of said strip of lands in severalty, in satisfaction of the covenants of said agreement of April, 1871. *Held*, that the Elyton Land Company was estopped, as against the S. & N. Ala. Railroad Company, from insisting that the strip of land so conveyed to it was to be held as a right-of-way for all other railroad companies as well as for itself.

3. *Use of right-of-way by railroad company.*— Land which a railroad company has acquired for a right-of-way may, unless restrained by the terms of the grant, be appropriated to the erection of depots or other buildings necessary or proper for the transaction of its ordinary business.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. JAMES B. HEAD.

This action was brought by the Elyton Land Company,
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a private corporation, against the South & North Alabama Railroad Company, to recover the possession of a tract or strip of land, which was thus described in the complaint: "A strip of land 35 feet wide, on the north side of and adjoining the line of the right-of-way of the Alabama Great Southern Railroad Company, as located and extended from the west side or line of section 29, township 17, range 2 west, to the north line of section 2, township 18, range 3 west." Issue was joined on the plea of not guilty, and a jury was waived. The court rendered judgment for the plaintiff, for all the land sued for, except a strip which is described in the bill of exceptions as the "land lying between the west line of Fourteenth street and the east line of Twenty-fourth street." The plaintiff excepted to this ruling, and here assigns it as error. The action was commenced on the 25th September, 1889.

The strip of land sued for is part of a large tract containing nearly 4,000 acres on which the city of Birmingham is situated, and which was conveyed to the Elyton Land Company by Josiah Morris and wife, by deed dated February 28, 1871. At that time, the Alabama & Chattanooga Railroad Company was constructing its road, and had acquired a right of way through the lands, fifty feet wide from the center of its track on each side, and extending diagonally from the North-east to the South-west through the whole tract; and the South & North Ala. Railroad Company was constructing its road between Montgomery and Decatur in such a direction that it would cross the track of the former company near or within the limits of Birmingham. On the 21st April, 1871, a written agreement was entered into between the Elyton Land Company as party of the first part, the Alabama & Chattanooga Railroad Company as party of the second part, and the South & North Ala. Railroad Company as party of the third part, as follows: "That for and in consideration of the payment of one dollar to the party of the first part by the parties of the second and third parts, the receipt whereof is hereby acknowledged, and for the further consideration of their doing and performing the presents as hereinafter stipulated and stated, the said party of the first part has bargained, sold and conveyed, and by these presents doth bargain, sell and convey unto the parties of the second and third parts, jointly and severally, the following described tracts or parcels of land, lying and being in the city of Birmingham," describing two strips, one on each side of the track of the A. & C. road, "forming two parallelograms, 415 feet wide and 4,780 feet long; all for the

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purposes and upon the conditions, that they build, construct and use thereon their depots, machine-shops and tracks, for the use of themselves, at said city of Birmingham; and upon the further condition, that they shall give, grant, sell and convey unto the two first railroad corporations constructing their roads through from their terminus to said city an equal and sufficient quantity of the above granted premises, not exceeding one-fourth each, for their depots, tracks and machine-shops and other railroad property; and upon the further condition, that a portion of said premises near the center of the track [tract?], not less than 415 by 900 feet, be appropriated and used forever as a general passenger depot for each and every railroad entering the city of Birmingham, with right-of-way to the same; and upon the further condition, that the party of the third part shall have the perpetual and full [free?] use of the right-of-way of the party of the second part, in a manner hereafter [to be] described by deed, and that the strip of 35 feet lying between the right-of-way of the party of the second part, on each side of said railroad, and the two parallelograms first above conveyed, shall be held by the party of the first part forever, as a perpetual right-of-way for all railroad companies doing business in and through the said city as aforesaid. It is further stipulated by all parties that the alternate streets crossing said above described railroad and premises shall only [always?] be kept open and unmolested. The party of the first part also agrees to make and deliver to each of the parties of the second and third parts the proper deed and conveyance to the portions of said premises as selected and agreed on between themselves."

On the 30th April, 1872, the Elyton Land Company conveyed by deed to the South & North Ala. Railroad Company, "for the right-of-way of their road forever," a strip of land "fifty feet wide on each side of the center line of their railroad as at present located and built, commencing at the southern limit of their land, and running northward to the right-of-way of the Alabama & Chattanooga Railroad Company near the crossing of said A. & C. railroad, and also from the right-of-way of said A. & C. railroad near the point where the South & North Ala. railroad diverges on the north from the said A. & C. railroad, to the northern limit of their said property;" but the deed contained a proviso, "that any other railroads running into or through the city of Birmingham shall have the

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right to run a parallel track along and upon the same right-of-way."

On the 31st March, 1881, the Elyton Land Company filed its bill in equity against the Alabama Great Southern Railroad Company, as the successor of the Alabama & Chattanooga Railroad Company, and against the South & North Ala. Railroad Company; alleging that the sole consideration of said contract of April 21, 1871, on the part of complainant, was to induce said railroad companies to build their depots, &c., within reasonable time, at Birmingham; that the South & North Ala. Railroad Company had partially complied with the conditions specified in said contract, and was entitled to "an equitable portion of said lands, to-wit, one-twelfth part thereof, but the other corporations, having failed, are not entitled to any part thereof." Complainant claimed "the right to enter upon and resume possession and title to said body of lands, as against all of said railroad companies except the South & North Ala. Railroad Company to its equitable portion as aforesaid," and "that there has been a defeasance of title in consequence of such non-compliance as against all of said other railroad companies." The bill therefore prayed the court to "declare the title of said railroad companies, in and to the lands conveyed by said deed [contract], vacated and divested with the exception aforesaid, and, if they be entitled to an election to comply with such conditions, that they do so at once; and failing to comply, that the court declare their title vacated." An amendment of the bill was allowed, which alleged that the lands, when purchased by the Elyton Land Company, were subject to the right-of-way of the A. & C. Railroad Company; that said company, after its purchase, "granted 35 feet on each side of the right-of-way of said A. & C. Railroad Company, to be reserved property as a common right-of-way to companies which, within a reasonable time, might be doing business in and through said city of Birmingham; that the S. & N. Ala. Railroad Company, by agreement with the said A. & C. Railroad Company, ran its road on the north side, near to and parallel with the road of the said A. & C. Railroad Company, and on the right-of-way of said A. & C. company through said city of Birmingham; and that the South & North Ala. Railroad Company, by mistake, has built its machine-shops on said 35 feet reserved by said Elyton Land Company and granted as a common right-of-way for roadbeds for companies which might do business in and through said city on railway or beds.

Decrees *pro confesso* were entered against each one of the

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defendant corporations, and a decree was afterwards rendered as follows: "It appears from the allegations of the bill, and the admissions of complainant in open court, that the South & North Ala. Railroad Company has substantially complied with the terms and conditions of the agreement of April 21st, 1871, and has agreed with the complainant on the boundaries of the lots or parcels of land to which said railroad company is entitled under said agreement, being part and parcel of the lands therein described; and as to the lands so designated and set apart to said South & North Ala. Railroad Company, and as to all other rights acquired by it for its own use under said agreement, said agreement remains unaffected by this decree. But it further appears from the bill, as taken confessed against the Ala. Great Southern Railroad Company, that the Alabama & Chattanooga Railroad Company and its successor, the said Ala. Gr. So. Railroad Company, have wholly failed to comply with the terms and conditions of said agreement of April, 1871, and have forfeited all rights and privileges under said agreement; and it further appearing that said agreement, in so far as it is intended for the use and benefit of railroad companies other than the said South & North Ala. and the Alabama & Chattanooga companies, is a voluntary trust, which the grantor, before acceptance, is entitled to revoke and annul; and it further appearing that no other railroad company has accepted the uses and benefits of said agreement, or claimed any benefit thereof within a reasonable time from the making thereof: It is therefore ordered, adjudged and decreed, that said agreement or conveyance of April 21st, 1871, be and is hereby revoked, annulled, and declared void and of no effect, as to said Alabama & Chattanooga Railroad Company and its successor, the said Ala. Great Southern Railroad Company, and as to all other railroad companies and all other persons, reserving, however, the rights of the South & North Ala. Railroad Company, for its own use, under said agreement, as hereinbefore declared. It is further ordered and decreed, that the said Elyton Land Company shall and does hold the lands described in the agreement, excepting and saving only so much thereof as has been set apart and designated to the South & North Ala. Railroad Company as hereinbefore declared, in all respects as if said agreement or conveyance had not been made; and any cloud upon the title of said Elyton Land Company created by said agreement or conveyance, upon the lands therein described, excepting and saving only the lands set apart to the South

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& North Ala. Railroad Company as aforesaid, be and is hereby removed."

Afterwards, by deed dated April 28th, 1882, the Elyton Land Company conveyed to the South & North Ala. Railroad Company, a strip of land thus described: "Beginning at a point on 18th Street in the city of Birmingham, between First Avenue North and the right-of-way of the Ala. Great Southern Railroad Company, 35 feet from said right-of-way, running North-east, at right angles with said right-of-way, 182.5 feet; thence South-west, parallel to said right-of-way, 900 feet; thence South-east, at right angles to said right-of-way, 182.5 feet, along 18th Street to the point of beginning, the whole forming a parallelogram 900 feet by 182.5 feet; the same to be used as a general passenger depot by said party of the first part for the convenient transaction of its passenger business in said city of Birmingham, upon the condition that any other railroad company now doing business in Birmingham, or which may hereafter build its railroad to Birmingham, shall have access to and use of said general passenger depot, upon equitable terms to be agreed on between them and said South & North Ala. Railroad Company." This deed recited the material facts above stated, and that the South & North Ala. company accepted the land conveyed by it, together with that conveyed by the deed of April, 1872, in full satisfaction of all rights acquired by it under the agreement of April, 1871.

The defendant erected its freight depot and other structures on the 35-foot of land described in the agreement of April 21st, 1871, some of them being within the limits of the strip afterwards conveyed to it in severalty, and the others without. For the latter portion of the strip sued for the court rendered judgment for the plaintiff, but refused to render judgment for the residue; and this ruling is assigned as error by the plaintiff.

ALEX. T. LONDON, for appellant, submitted a printed argument, in which he maintained the following propositions, and cited the following authorities: (1.) Under the agreement of April 21st, 1871, the South & North Ala. Railroad Company acquired only an easement in the 35 foot strips in common with all other railroad companies. This construction of the agreement is apparent from its own terms, considered in connection with the circumstances which gave birth to it, as illustrating the objects and purposes of the respective parties. The S. & N. Ala. company built its freight depot on the strip with the consent of the Elyton

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Land Company, and recognized the title of that company to it until the destruction of the depot by fire in 1884. (2.) The said agreement, in connection with the maps of the property, was a dedication of the strips for railroad purposes.—5 Amer. & Eng. Encyc. Law, title *Dedication*; 6 Hill, N. Y. 411; *Booræm v. North Hudson Railroad Co.*, 40 N. J. Eq. 557; 118 Ill. 61-70; 72 Cal. 170; 1 Hill, N. Y. 189-91; 19 Wend. 128; 64 N. Y. 65; *Bartlett v. Bangor*, 67 Me. 460. (3.) The dedication must be for public, as distinguished from private uses, but it may be limited to special uses of a public character.—Washburn on Easements, 203-5, 215-6; 41 N. J. Eq. 606; 2 Amer. & Eng. Encyc. Law, 416; *Beatty v. Kurtz*, 2 Peters, 566; *Antonez v. Esluva*, 9 Porter, 544; Elliott on Roads & Streets, 109; 7 B. & C. 257; 2 Stra. 1004; 11 East, 375; *Cincinnati v. White*, 6 Peters, 431; Angell on Highways, 146, 3d ed.; 2 Smith's L. C. 164-5. (4.) There may be a dedication of land for railway purposes, as for a right-of-way, or for a general depot; and such dedication is for a public use, as much as a landing for steamboats, or for a public wharf.—*New Orleans v. United States*, 10 Peters, 662; *Gardiner v. Tisdale*, 2 Wisc. 153; *Godfrey v. Alton*, 12 Ill. 29; *Bolt v. Stennett*, 8 T. R. 606; 7 Wall. 272; 27 Fed. Rep. 412; *Railway Co. v. Greeley*, 17 N. H. 47; 4 Ohio St. 308; 16 Ohio St. 330. (5.) The decree *pro confesso* in the chancery suit is a solemn admission by the South & North Ala. Railroad Company of the dedication of the strip in controversy as a common right-of-way for all railroads. The bill in that case did not attempt to affect that part of the land which the Elyton Land Company had agreed to hold as a common right-of-way for all railroads, and the decree *pro confesso* was an admission that these strips were held as a common right-of-way, and were subject to no conditions. The bill did not ask a rescission of the agreement as to these strips, and the decree to that effect was ineffectual.—54 Ala. 291; 57 Ala. 246; 69 Ala. 86. (6.) The deed of 1882 conveyed to the defendant no greater rights than were acquired under the agreement of 1871, and it was accepted in satisfaction of those rights. (7.) The erection of the defendant's depot on the strip in controversy is a *misuser* of it, which entitles the plaintiff to maintain ejectment.—*Perley v. Chandler*, 6 Mass. 454; *Ayres v. Penn. Railroad Co.*, 57 Amer. Rep. 538; 6 Amer. & E. Encyc. Law, 233; *Cooper v. Smith*, 9 S. & R. 26; *Bolling v. Mayor*, 3 Rand. 563; 39 Miss. 805; 1 Burr. 138; 2 Johns. 357; 15 Johns. 447; 104 Mass. 1; *Morgan v. Moore*, 3 Gray, 319; 67 Penn. St. 507; 50 N. Y. 646; 3 Wait's A. & D. 8.

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HEWITT, WALKER & PORTER, *contra*.—(1.) The agreement of 21st April, 1871, conveyed to the defendant the right-of-way over and through said 35-foot strip of land.—Code, § 1831; *Jones v. Reese*, 65 Ala. 134; *Wilkinson v. May*, 69 Ala. 34; *Doe v. Ladd*, 77 Ala. 223; *Webb v. Crawford*, 77 Ala. 440. (2.) The complainant is estopped by the chancery decree and its subsequent deed to the defendant from asserting that any other railroad company has any right or interest in said strip of land. (3.) The erection of the defendant's depot on the land is not a *misuser* or misappropriation of it, but was a legitimate use for railroad purposes. (4.) If the erection of the depot were a *misuser*, the plaintiff could not maintain ejectment on account of it, because it was not entitled to the possession.

WALKER, J.—The land involved in this suit is included in the description of the strips of land lying on either side of the right-of-way of the Alabama & Chattanooga Railroad Company, which, by the terms of the contract of April 21st, 1871, between the Elyton Land Company, the Alabama & Chattanooga Railroad Company, and the South & North Alabama Railroad Company, were to be held by the Elyton Land Company forever as a perpetual right-of-way for all railroad companies doing business in and through the city of Birmingham. That contract was before this court in the case of the *Alabama Great Southern R. R. Co. v. South & North Ala. Railroad Co.*, 84 Ala. 570, and the extent of the right conferred by its terms upon the South & North Alabama Railroad Company in the right-of-way of the Alabama & Chattanooga Railroad Company was there determined. In March, 1881, the Elyton Land Company filed its bill in chancery against the South & North Alabama Railroad Company and the Alabama Great Southern Railroad Company, alleging in substance the existence of the contract above referred to, the non-compliance by the Alabama Great Southern Railroad Company as the successor of the Alabama & Chattanooga Railroad Company with the conditions of said agreement to be performed by the former of these two companies, and the partial compliance by the South & North Railroad Company with the conditions to be performed by it under said contract, so as to entitle that company to a portion of the lands which it was to receive under the contract. The complainant in that bill sought thereby to have revoked and declared forfeited the benefits stipulated for by said agreement in favor of the Alabama Great Southern Railroad Company, and of all other railroad

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companies, except the South & North Ala. Railroad Company. Decrees *pro confesso* were entered against both the defendants. A final decree was rendered in which it was recited that "it appears from the allegations of the bill and the admissions of complainant in open court that the South & North Alabama Railroad Company has complied substantially with the terms and conditions of the agreement of April 21st, 1871, and has agreed with the complainant on the boundaries of the lots or parcels of land to which the South & North Alabama Railroad Company is entitled under said agreement, being part and parcel of the lands therein described, and as to the lands so designated and set apart to the South & North Alabama Railroad Company, and as to all other rights acquired for its use, by said South & North Alabama Railroad Company under said agreement, the said agreement remains unaffected by this decree." It was decreed that said agreement be revoked, annulled and declared void and of no effect as to the Alabama & Chattanooga Railroad Company and its successor, the Alabama Great Southern Railroad Company, and as to all other railroad companies and all other persons; but the decree expressly reserved the right of the South & North Alabama Railroad Company for its own use under said agreement. The conclusive effect of this decree upon the rights of the Alabama Great Southern Railroad Company was fully recognized in the case above cited. The result of the decree was to exclude all claim by that company upon any lands of the Elyton Land Company covered by the terms of the contract in question, and to leave the interest of the South & North Alabama Railroad Company in the strip of land involved in this suit undiminished, and, indeed, augmented, certainly to the extent of the exclusion of the Alabama Great Southern Railroad Company from participation in the benefits of the contract. The decree just referred to was followed by a deed, executed in April, 1882, whereby the Elyton Land Company conveyed to the South & North Alabama Railroad Company certain lands which were accepted by the latter company as the residue of the lands to which it was entitled under the contract of April 21st, 1871. It was again recited in this deed that the Elyton Land Company claimed that the Alabama & Chattanooga Railroad Company and all other railroad companies except the South & North Alabama Railroad Company had failed to comply with the terms and conditions of said original contract or agreement, and that said agreement was revoked and annulled as to all other companies or persons ex-

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cept the South & North Alabama Railroad Company. It was expressly stipulated in that deed that the right of the grantee therein, acquired by said original agreement, to the strip of land thirty-five feet wide, a portion of which is involved in this suit, should remain in full force and effect, but that the right-of-way over said strip was abrogated as to all other railroad companies.

It is contended for the appellant that the agreement of April 21st, 1871, together with the maps of its property made and published at that time, effected a dedication of the strips of land, a portion of which is involved in this suit, for the purposes stated in the agreement, and that this dedication was irrevocable, and could not be affected by the decree and the deed of 1882 above referred to. It is further contended that the erection of the depot on the strip in controversy is a misuser and a diversion of it from the purposes to which it was devoted by the dedication, which entitles the plaintiff to maintain ejectment for the recovery of the property. The consideration that railroads are devoted to public uses affords the justification for the exercise of the power of eminent domain for the acquisition of private property for railroad purposes. But the land held by a railroad company for the purposes of its enterprise, whether acquired by condemnation proceedings or by purchase from the owners, is, so far as the right of property is concerned, private property. The incidents of private ownership attach to it. The title is in no manner vested in the public, or in any part of the public as such. The title of the railroad company is as exclusive as that of any sole grantee in a conveyance of land. It must use the property for the public purposes for which it was acquired under public authority. Though the property must be so used, still the ownership is private, and the public do not share in such ownership. The public are entitled to use the property, but they use it as the property of the company, and the company is entitled to compensation for such use. The law secures to the company the exclusive possession and dominion of the property, and only requires that it be devoted to the purposes of public use and convenience to subserve which its acquisition was authorized. Land set apart for a railroad right-of-way, if accepted by the railroad company, is taken as the company's private property and for its individual profit, though such company by taking the property charges itself with a public duty as to the use to which the property is to be devoted. The acceptance by the company is in its own behalf, and can not properly be

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said to be in behalf of the public. A dedication is "an appropriation of land to some public use made by the owner of the fee, and accepted for such use by or on behalf of the public." The public is treated as the grantee, and the gift enures immediately to the public.—5 Am. & Eng. Ency. of Law, 395, 399; *Steele v. Sullivan*, 70 Ala. 589. Dedication is not a mode of conferring a private property right in land. The only cases, not controlled by special statutory provisions on the subject, in which we have found the donation of land for railroad purposes spoken of as a dedication involved only the assertion of a claim to the property in question by the railroad company itself; and in such cases the claim was either disallowed, or was rested, not upon a common-law dedication, but upon an adverse possession by the railroad company, or upon a state of facts raising an estoppel *en pais* against the holder of the legal title which would have precluded him from asserting his title against any one who had occupied and improved the land with his knowledge and consent under similar circumstances.—*Morgan v. Railroad Company*, 96 U. S. 716; *Texas & New Orleans Railway Co. v. Sutor*, 56 Texas, 496; 11 Am. & Eng. R. R. Cases, 506; *Daniels v. Chicago & N. W. R. Co.*, 35 Iowa, 130; *Forney v. Calhoun Co.*, 86 Ala. 463. It seems that when the act to be relied upon as the acceptance of a proposed appropriation of property is to be done, not by the public, or in behalf of the public, but by an individual or by a private corporation, intending to take the property in its own behalf for use in a business enterprise to be prosecuted for its own profit, and the property is to be acquired as private property and for private gain, so that the public are not to share in the ownership or in the benefits of ownership, but the new private proprietor, by taking the property for the purposes in view, only charges itself with the duty of using the property for public purposes on receiving compensation for such use; then such appropriation of the property, to be binding upon the holder of the legal title, must be effected by his contract, grant or conveyance, unless he has precluded himself from asserting his title as the result of a state of facts which would have a like effect against him in favor of a purely private party; and that it does not follow that such an appropriation is effected because the act of the proprietor would have amounted to a common-law dedication if the gift had enured immediately to the public, and a private ownership for private profit had not intervened. It seems that a railroad company can not hold its road, rights of way, depot grounds or

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other property against the former proprietor thereof, unless its alleged interest therein has been secured to it in one of the modes provided by law for the vesting of private property rights in private parties. In the cases found by us in which the claim of a railroad company to such property has been rested solely upon a state of facts which would have amounted to a dedication if the appropriation had been for a public use, such claim has not been allowed; and the rejection thereof has been put upon the ground that such an interest in property could not be conferred upon a private party by what is known to the law as a dedication.—*Watson v. Chicago & St. Paul R. Co.*, 46 Am. & Eng. R. Cases, 543, a decision by the Supreme Court of Minnesota; *Todd v. Pittsburg, St. W. & C. R. Co.*, 19 Ohio St. 514.

But, even if it be conceded that the contract of April 21st, 1871, if standing alone, should be given effect as an irrevocable dedication of the property in question as a perpetual right-of-way for all railroad companies doing business in and through the city of Birmingham, and that other railroad companies could claim the benefit of that dedication and would be entitled to prevent the appellee from appropriating the property to a purpose inconsistent with its use as a common right-of-way; yet the Elyton Land Company is not now in a position to assert such claim against the South & North Alabama Railroad Company. In the first place, it plainly appears that the appellant obtained the decree on the bill in chancery above referred to by representing that the appropriation of lands, including that involved in this suit, which was provided for by the contract of April 21st, 1871, was conditional and revocable, and the adjudication that such was the effect of that contract was necessarily involved in the decree then made. Furthermore, the deed of April 28th, 1882, was, in effect, a final settlement and adjustment between the parties to this suit of their respective rights under the contract of April 21st, 1871. It plainly appears from the recitals contained in that deed that the appellant thereby formally admitted that the claims of all other railroad companies to participate in the use of the strip of land, a portion of which is involved in this suit, had been duly and rightfully abrogated; and that the appellees' right to the exclusive use of that land for the purpose to which it was devoted by the original contract was fully recognized. The recital in that deed of the reservation of the appellee's right in said strip, and the forfeiture of the claims of all other railroad companies thereto, was a particular recital of material facts which entered into the con-

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sideration moving to the appellee for the covenant and releases then made by it. The appellant having obtained the decree above referred to by representing the instrument upon which it now relies as having an operation wholly different from that now sought to be imputed to it, and having, in its subsequent deed, solemnly admitted as a material fact that the appellee alone is entitled to use the land in dispute as a right-of-way, is now estopped from setting up a claim inconsistent with such a representation and admission. The proceedings in the chancery cause and the recitals in the deed referred to show solemn admissions by the appellant that the land in dispute was not irrevocably dedicated, as is now claimed, and the appellant is bound by those admissions, certainly so far as concerns its present claim against the appellee.—*Pratt v. Nixon*, 91 Ala. 192; *Jones v. Morris*, 61 Ala. 518; *Tait v. Frow*, 8 Ala. 543; *Brown v. Hamil*, 76 Ala. 506; *Caldwell v. Smith*, 77 Ala. 157; *Hill v. Huckabee*, 70 Ala. 183, *Bigelow on Estoppel* (5th Ed.) 366 *et seq*; 7 Am. & Eng. Ency. of Law, 7.

The extent of the interest acquired by the appellee in the land in dispute is to use it as a right-of-way. The appellant has not deprived itself of the right to confine the appellee to this particular use of the property, though it can no longer claim that other railroad companies are entitled to share in such use. The claim now made is that the erection of a freight depot and other structures on the strip is a diversion of the property from the purpose to which it was appropriated. In the interpretation of an agreement regard is to be had to the situation of the contracting parties at the time it was made, the occasion which gave rise to it, and the obvious design intended to be accomplished.—*Tennessee & Coosa R. Co. v. East Ala. Railway Co.*, 73 Ala. 444. For reasons already stated, the appellant can not now deny that the appropriation of the property for the particular use mentioned was conditional, and that the right to participate in the use was forfeitable by any railroad company which should fail within a reasonable time to comply with the conditions imposed. According this meaning to the contract, and it is plain that the contingency of only one railroad company becoming entitled to the benefits offered by the contract was within the purview of its terms. The appellant has admitted by its deed that such contingency has happened, that all other railroad companies other than the appellee have forfeited all claims under the contract to the use of the strip in dispute, and that the right to use it for the stipulated purpose is vested in the appellee alone.

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The parties are to be treated as having contemplated the possibility of the appellee acquiring the exclusive use of the strip as a right-of-way for its railroad alone.

It is to be observed that another provision of the same, contract secured to the appellee the perpetual and free use of the right-of-way, one hundred feet wide, of the Alabama & Chattanooga Railroad Company (*Ala. Gt. Southern R. Co. v. South & North Ala. R. Co.*, 84 Ala. 570), so that the result of the appellee's compliance with the terms of the contract was to secure to it one right-of-way to be enjoyed by it in common with one or more other railroad companies, and also an exclusive right of way in another strip. In view of the fact that the use of the right-of-way of the Alabama & Chattanooga Railroad Company was secured to the appellee, the question to be determined is, did the appellant in stipulating for an additional right-of-way, which might become vested in the appellee exclusively, intend, in the event of such right so becoming exclusive, that the strip so appropriated should not be occupied by depots or other buildings adapted to railroad purposes, but should remain open so that tracks could be run over it. Such a meaning can not be imputed to the contract unless a railroad right-of-way is an interest of such limited scope that the land included therein must be devoted by the railroad company exclusively to a tract or tracts over which trains may pass. It is a matter of common knowledge that the railroad business involves the use, not only of cars and tracks, but of buildings and structures of various kinds. It was contemplated that the strip of land in dispute in this case should be used as a right-of-way in a city. The place was expected to be the scene for the transaction of many phases of the business different from but incident to the mere act of carrying persons or things. It was to be the place for receiving, delivering, storing and transshipping freight. In such places it is frequently necessary for the convenient transaction of a railroad business to have platforms, warehouses, lumber-yards, elevators, cattle-pens, engine-houses, car-sheds, depots, repair-shops, and other like facilities contiguous to the tracks. The space which is commonly called the railroad right-of-way is, in populous localities, generally found dotted with structures, other than the tracks, which are necessary or convenient for the transaction of the business of a common carrier; and we think that the erection of such structures is to be regarded as within the contemplation of the parties to a contract which stipulates for the use of land in such a locality as a railroad right-of-way, unless the

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contrary appears from the terms of the contract. Ordinarily, the right-of-way of a railroad company is its exclusive property, and the company is entitled to its free and unobstructed use.—*Memphis & Charleston R. Co. v. Womack*, '84 Ala. 149. The company is entitled to an absolute and exclusive possession, so far as to secure fully every purpose for which the railroad is made and used.—*Tenn. & Coosa R. Co. v. East Ala. Railway Co.*, 75 Ala. 524. The question is, what are the uses to which the right-of-way may be devoted.

The Western Railroad Corporation was authorized by its charter to lay out its road, not exceeding five rods wide, through the whole length, and to acquire such strip by condemnation proceedings. In reference to the rights of the company within this area, Shaw, C. J., delivering the opinion of the Supreme Court of Massachusetts, said: "To the extent of five rods, it appears to us the legislature intended that the franchise of this corporation should extend, for any and all purposes incident to the object of its creation. It was contended in argument, that their franchise for public purposes extended only to the use of this strip of land as a way, and that if they had occasion for buildings and storehouses, as incident to their operations as carriers of persons and merchandise, they were to be regarded in their latter capacity as carrying on a distinct business, for their own profit, and therefore that such buildings were not to come under the same franchise. But no such limitation is contained in the act of incorporation, and none such results from the nature of its provisions. The establishment of the rail track, and the maintenance of engines and cars, for the transportation of persons and goods, are all combined together, as one public object to be attained, and the privileges incident to the one are incident to the other. No doubt, in practice, the main use of the strip of land of five rods in width, in the greater part of its extent, will be for sustaining the track for the trains to pass over. But such restriction of its use is not found in the act; and therefore, when the corporation have occasion to use any part of such strip of five rods for any of the purposes incident to their creation, it is within their franchise." And, under the law of that State exempting public works from taxation, it was decided in that case, "that this railroad corporation are not liable to taxation, for the land of the width of five rods, located for the road, nor for any buildings or structures erected thereon, so that they be reasonably incident to the support of the railroad, or to its proper or convenient use

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for the carriage of passengers and the transportation of commodities; and that this includes engine and car houses, depots for the accommodation of passengers, and warehouses for the convenient reception, preservation and delivery of merchandise, and all goods and articles carried on the road." *Inhabitants of Worcester v. Western R. Corporation*, 4 Met. 564. That court has, in later cases, continued to recognize the right of a railroad company to occupy with buildings or other structures the land acquired for its railroad, so long as the mode of occupation is necessary or proper for the convenient exercise of the privileges and the performance of the functions defined by its charter.—*Proprietors of Locks & Canals v. Nashua & Lowell R. Co.*, 104 Mass. 1; *Boston Gas Light Co. v. Old Colony & Newport Railway Co.*, 14 Allen, 444; *Brainard v. Clapp*, 10 Cushing, 6; *Pierce v. Boston & Lowell R. Co.*, 141 Mass. 481.

In *Illinois Central R. Co. v. Wathen*, 17 Bradw. (Ill. App.) 582, it was held that on land granted for "railroad and depot purposes" the company could permit the erection and use by private parties, without the payment of rent, of elevators, corn-cribs, lumber-yards and lime-houses, which facilitated the business of the company in the receipt, transportation and discharge of freight. In *Western Union Telegraph Co. v. Rich*, 19 Kansas, 517, it was held that a railroad company may, for its own use in operating its road, construct a telegraph line over and along its right-of-way, and that by such use of the property it did not subject itself to an additional claim of the original land-owner for compensation. The opinion of the court was delivered by Judge Brewer, now an associate justice of the Supreme Court of the United States. In the course of the opinion it was said: "In short, the railroad company may use its right-of-way, not merely for its track, but for any other building or erection which reasonably tends to facilitate its business of transporting freight and passengers, and by such use in no manner transcends the purposes and extent of the easement, or exposes itself to any claim for additional damages to the original land-owner."

The authorities support the conclusion that a railroad company may make any use of the land acquired by it for use as the right-of-way for its railroad, which, directly or indirectly, contributes to the safe, economical and efficient operation of the road, and which does not interfere with the rights of property pertaining to the adjacent lands.—*Lewis on Eminent Domain*, §§ 584, 588, and cases there cited; *Gudger v. Richmond & D. R. Co.*, 43 Amer. & Eng. R. Cas.

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606; *Railroad v. Deal*, 90 N. C. 110. The land here in dispute must be treated for the purposes of this case as secured to the appellee alone as an additional right-of-way in the heart of a city. The depot and other structures erected thereon afford such conveniences and facilities as a railroad company may be expected to provide for the transaction of its business in such locality. The land is used for the purposes incidental and auxiliary to the transportation business authorized to be conducted on and over it; and, as the appellant can not complain of the exclusive character of the occupancy, the uses shown do not, in our opinion, constitute a diversion of the property from the purposes to which it has been devoted. The conclusion is that the evidence does not support the claim that there has been a *misuser* by the appellee of the right-of-way in question.

The right to maintain the action is based upon the alleged *misuser*. It is not intended to be admitted that, if such *misuser* had been shown, the appellant would be entitled to a judgment in the statutory action in the nature of ejectment for land of which it could not hold possession, because, according to its claim, the appellee and other railroad companies were entitled to possess it and use it as a right-of-way.—*Cincinnati v. White*, 6 Peters, 431; 3 Brick. Digest, 324, § 27.

Affirmed.

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ACTION.

1. *Action for surplus proceeds of sale of mortgaged property under power.* When land is sold under a power contained in a mortgage, and brings more than the amount of the mortgage debt, with interest and lawful charges, the mortgagor or his assignee may recover the proceeds by action for money had and received. *Tompkins v. Drennen*, 463.
2. *When action lies by wife against husband.*—Under the statutory provisions now of force (Code, §§ 2341-51), the wife may maintain an action against the husband for the recovery of personal property which she acquired by gift from him prior to the passage of those statutes. *Bruce v. Bruce* 563.
3. *Action against corporation in Alabama, for tort committed in Mississippi.*—An action can not be maintained against a railroad corporation in Alabama, for a tort committed in Mississippi, unless the tort was actionable at common law, or is shown to be actionable by statute in Mississippi. *Kahl v. M. & C. Railroad Co*, 337.
4. *Mississippi statutes giving action to personal representative of decedent.*—The statutes of Mississippi which authorize an executor or administrator to prosecute any personal action which his testator or intestate might have prosecuted, and to maintain an action for any trespass to the person or property of the decedent (Rev. Code of Miss., §§ 2078-9), are not substantially similar to the Alabama statute (Code, §§ 2590-92) known as the "Employer's Act." *Ib.* 337.
5. *When case or trespass lies for wrongful levy on goods.*—A claimant of goods which are in the rightful possession of the sheriff under the levy of an attachment, not having either the actual possession or the immediate right of possession, can not maintain an action of trespass against a subsequent attaching creditor; but, if the subsequent attachment is wrongfully levied on the goods, and loss or injury results to the owner, he may maintain an action on the case for damages. *Joseph v. Henderson*, 213.

ADVERSE POSSESSION.

1. *As between tenants in common.*—The possession of land by one tenant in common is not adverse to his co-tenant, unless an actual ouster is shown, or facts which the law deems equivalent to an ouster. *Sibley v. Alba*, 191.
2. *Partition; claim of adverse possession; issue at law.*—In a suit for the partition of land between tenants in common, if the defendant claims adverse possession of the entire tract, this does not oust the jurisdiction of the court, but requires a suspension of the proceedings until the question of disputed ownership can be settled on an issue made up and submitted to a jury. *Ib.* 191.

ADVERSE POSSESSION—CONTINUED.

3. *Conveyance of lands adversely held.*—A conveyance of lands adversely held is void as against the adverse possessor and those claiming under him; but this principle does not apply to a purchaser at a judicial sale, even though he is the plaintiff in the judgment or process. *Ib.* 191.

AMENDMENT.

1. *Of complaint.*—In an action on a judgment, properly describing it, additional averments as to the contract on which it is founded are unnecessary and superfluous; and a count added by amendment, containing a fuller description of the contract, is not a departure, nor objectionable as effecting a misjoinder. *Sims v. Herzfeld*, 145.
2. *Of affidavit for attachment.*—In an action commenced by attachment in the name of "*H. B. Clafin Company*," without other descriptive words, an amended affidavit may be filed (Code, § 2998), alleging that the plaintiff is a corporation. *Rosenberg v. Clafin Company*, 249.
3. *Of petition for rehearing at law.*—A judgment of the appellate court, on application for *mandamus*, vacating and annulling an order granting a *supersedeas* and rehearing after final judgment, or requiring the lower court to vacate and annul it, because it was rendered in vacation, leaves the petition itself still pending and unaffected; and it is the duty of the lower court to proceed with it, hearing demurrers, allowing proper amendments, substitution of lost papers, &c., as in other cases. *Seymour v. Furquhar & Son*, 527.
4. *Amendment of decree nunc pro tunc.*—If the order of sale refers to the petition as asking a sale for equitable division among the heirs, and to the depositions in support of it as proving that a sale is necessary for the payment of debts, this is a mere clerical misprision, which is amendable by the record; and the amendment may be made at a subsequent term; *nunc pro tunc*, without notice to the heirs. *Jones v. Woodstock Iron Co.*, 551.
5. *Amendment of bill of particulars.*—In an action on an account for goods sold and delivered, a bill of particulars being furnished on demand, in which the account is made out in the name of plaintiff individually; if the complaint is then amended by averring that plaintiff sues as assignee of two successive partnerships with whom the account was contracted, a corresponding amendment may be made in the heading of the bill of particulars. *Boykin v. Persons*, 626.
6. *Amendment of motion for summary judgment against sheriff.*—In a motion for a summary judgment against a sheriff and his sureties, for his failure to make the money on two executions issued by a justice of the peace, one of which was for less than \$100, there is an improper joinder of two separate and distinct causes of action, one of which is not within the jurisdiction of the court; but the motion may be amended, and the refusal to allow an amendment is a reversible error; and a recital in the judgment-entry, that the objections raised by demurrer "can not be cured by amendment," shows that the opportunity to amend was denied, although there is no bill of exceptions. *Hood v. Blair*, 629.
7. *Amendment of judgment on error.*—On the trial of a statutory claim suit, whether the issue is submitted to a jury or to the court (Code, § 3007), the judgment must show that the alternate value of the several articles of property was assessed; but the failure to do so, when the issue was submitted to the court for

AMENDMENT—CONTINUED.

decision, and the record clearly shows the alternate value of the property, is an irregularity which this court will correct, and will affirm the judgment as corrected. *Taught v. Oehmig & Wiehl*, 306.

ARBITRATION.

1. *Submission of pending suit to arbitration; subsequent trial by court.*
When a pending suit is submitted to arbitration, by agreement entered of record, and nothing is done under the submission by the next term (Code, § 3221), the court may, at a subsequent term, proceed and try the same, unless good cause is shown for a further continuance. *Davis v. Badders & Brill*, 348.

ASSIGNMENT.

1. *Assignment of policy of insurance, or interest in insured property.*
An assignment indorsed on a policy of insurance of furniture, by the husband to his wife, in these words: "The interest of M. B., as owner of the property covered by this policy, is hereby assigned to Bertha B., subject to the consent of the company," transfers to the wife the ownership of the property insured. *Behr v. Gerson*, 438.
2. *Conveyances by insolvent debtor, as parts of general assignment.*—An insolvent debtor having, under repeated decisions of this court, the right to sell and convey property in absolute payment of an existing debt, provided the price is fair and reasonable, and no use or benefit is reserved to himself, such absolute sale and conveyance will not, at the instance of other creditors, be declared and treated as part of a general assignment executed soon afterwards (Code, § 1737), though executed in anticipation of it, and with notice on the part of the creditor that the debtor intended to make a general assignment. *Ellison v. Moses*, 221.
3. *Same.*—A mortgage executed by an insolvent partnership to one of its members, to secure a debt for money loaned, which was in his hands as receiver in a chancery cause, with instructions to lend it out on mortgage of real estate, and which he allowed the firm to use without security, under the agreement or understanding, express or implied, that they would secure it by mortgage, will be declared and treated as part of a general assignment executed by the firm on the same day. *Id.* 221.

ATTACHMENT; GARNISHMENT.

1. *Who may issue attachment.*—The judge of the City Court of Selma being invested by statute with all the powers and authority conferred on the judges of the Circuit Court, "including the authority to issue writs of injunction, *mandamus*, *certiorari*, prohibition, *ne exeat*, and all other remedial writs," and a judge of the Circuit Court having express authority to issue attachments returnable to any county in the State (Code, § 2931), the judge of said City Court may issue an original attachment, which is a remedial writ, returnable to any county in the State. *Bledsoe v. Gary & Kennedy*, 70.
2. *Attachment as evidence of indebtedness.*—On the trial of a statutory claim suit, the plaintiffs' attachment is sufficient evidence of the defendant's indebtedness to them when it was sued out, and the claimant can not question it. *Moore, Marshman & Co. v. Penn & Co.*, 200.
3. *Levy of attachment between execution and registration of deed.*—The failure to file a conveyance for record until the twentieth

ATTACHMENT; GARNISHMENT—CONTINUED.

day after its date and execution does not affect its validity as against an attachment levied during the interval, especially where the attaching creditor had actual notice of the deed. *Buford, McLester & Co v. Shannon*, 205.

4. *Levy of attachment by constable; delivery of property to sheriff.*—When an attachment is issued by a justice of the peace, returnable to the Circuit Court, and placed in the hands of a constable to be executed (Code, § 2956), if the constable delivers the property levied on to the sheriff, the latter holds it in his official capacity as sheriff, and not as a mere bailee of the constable. *Joseph v. Henderson*, 213.
5. *Notice of levy of attachment; waiver.*—In an action commenced by attachment, the case does not stand for trial at the first term, unless the attachment is levied and notice thereof given twenty days before the commencement of the term (Code, § 2995); but the failure to give the notice is not good cause for dismissing the attachment at that term, and is waived by a general appearance, filing pleas, and going to trial. *Rosenberg v. Claflin Company*, 249.
6. *Levy of second attachment on property in hands of sheriff under prior attachment; liability on bond of indemnity.*—In an action by a sheriff on a bond of indemnity, which was given to procure the levy of an attachment on goods which were already in his possession under the levy of prior attachments, if it is shown that the levy was discharged by agreement between the plaintiff and the claimant of the goods, who thereupon released plaintiff from liability on account of the levy, but afterwards recovered a judgment against the sheriff; the defendants may show that the judgment was founded on the levy of the prior attachments, and a recovery can not be had against them, in any event, for more than nominal damages. *Smith v. Johnson*, 482.
7. *Landlord's lien on tenant's goods, for rent of storehouse; garnishment against assignee.*—When a tenant has made an assignment for the benefit of his creditors, the landlord may sue out an attachment to enforce his statutory lien on the goods and effects for the rent of the house in which the tenant lived, or carried on his business (Code, §§ 3069-70), and may summon the assignee by process of garnishment: and he is entitled to a judgment of condemnation for goods and effects remaining unsold in the hands of the garnishee, and also a money judgment for the proceeds of goods sold by him; but not for the proceeds of sale of property to which, though used by the tenant in and about his business, the landlord's lien never extended, nor for money collected for goods sold by the tenant, in the regular course of trade, prior to the assignment. *McKerroy v. Canteley & Randolph*, 295.
8. *Levy of attachment for rent on property not subject to writ.*—The levy of an attachment for rent on property which is not subject to it, is an abuse of the process for which the sureties on the bond are not liable. *Crofford v. Vassar*, 548.
9. *Attorney's fees as damages.*—In an action on an attachment bond, attorney's fees for defending the attachment suit may be recovered as damages, if specially claimed; but an assignment claiming "special damages in the sum of one hundred dollars, in that by said attachment he was put to the expense of employing counsel to defend said attachment suit," is scarcely sufficient without a statement of some amount paid or incurred. *Ib.* 548.

ATTACHMENT; GARNISHMENT—CONTINUED.

10. *Actual and exemplary damages*.—In an action on an attachment bond, actual damages may be recovered under a complaint which negatives the existence of any statutory grounds for suing out the writ; but, to authorize a recovery of exemplary or vindictive damages, the existence of probable cause must also be negated. *Ib.* 548.
11. *Same; averments of breach*.—An averment in the complaint that "said attachment was wrongfully and vexatiously sued out, and so sued out without the existence of any of the statutory grounds for the issuance of such attachment;" or, that said attachment "was wrongfully, vexatiously and maliciously sued out, in that no statutory ground existed, either for the enforcement of any existing lien, or for the purpose of creating a lien,"—simply negatives the existence of any cause for suing out the writ. *Ib.* 548.
12. *Relevancy of evidence as to actual damages and malice*.—Damages to the cotton levied on, by being allowed to remain too long in the field after the levy, may be proved and recovered as a part of the actual damages; and if exemplary damages are claimed, plaintiff may prove, as tending to show malice, the declaration of his landlord after some difficulty between them, several months before the writ was sued out, "that he intended to get everything that plaintiff made on the plantation that year for nothing." *Ib.* 548.
13. *Indebtedness accruing between service of garnishment and answer*. A garnishee is required to answer as to his indebtedness, not only at the service of the garnishment, and at the time of making his answer, but also during the intervening period (Code, § 2946), even though the writ or citation does not so state; and being required to make further oral answer, this liability continues until final judgment against him or discharging him. *Ensley Furnace Co. v. Rogan & Co.*, 594.
14. *Claim of exemption by debtor to indebtedness admitted by garnishee under continuing contract*.—When a garnishee admits an indebtedness under a continuing contract of employment, which either party has a right to terminate without notice at the end of any month, and a claim of exemption is thereupon interposed by the debtor, the claim extends only to the indebtedness then existing; and an oral answer being required, if the garnishee then admits a further indebtedness under the contract, as modified from time to time, and a new claim of exemption is then interposed, this claim can not retroact on payments made during the intermediate period. *Ib.* 594.
15. *Claim of exemption against garnishment; record of another suit as evidence*.—When two garnishment suits are pending against the same defendant and the same garnishee, but in favor of different plaintiffs, the court will not look to the record of one case on the trial of the other, except as it is offered in evidence; and if it appears that the debtor filed a claim of exemption in the second case, and that it was not contested, the plaintiff in that case can not complain that the court ordered the older judgment to be first satisfied, and awarded him only the admitted balance remaining in the hands of the garnishee. *Young v. L. & N. Railroad Co.*, 454.
16. *Issue and service of garnishment*.—In an action commenced by original attachment, the sheriff may execute the writ by summoning a person as garnishee (Code, §§ 2945-6), himself signing the summons officially, and indorsing the service on the attach-

ATTACHMENT; GARNISHMENT—CONTINUED.

- ment; but the clerk has no authority to issue a summons in garnishment, directing the sheriff to summon certain named persons as garnishees; and such process being void, when no writ of attachment has been issued, its service by the sheriff is also unauthorized and void. *Donald Bros v. Nelson & Sons*, 111.
17. *Defects available to garnishee*.—A garnishee can not take advantage of mere irregularities in the attachment proceedings; but, when the writ is void, or the garnishment process is issued by an officer without authority, or the service thereof is unauthorized and void, he may take advantage of these defects by plea in abatement. *Ib.* 111.
 18. *Filing pleadings; what is revisable*.—Leave to file a replication to a plea in abatement, after the expiration of the time allowed by the rules of practice rests in the discretion of the court, and its refusal is not revisable. *Ib.* 111.
 19. *Contest of garnishee's answer denying indebtedness*.—When the answer of a garnishee denies any indebtedness, and his answer is contested by the plaintiff in attachment, the issue of indebtedness *vel non* does not go beyond the service of the garnishment, though evidence of a prior indebtedness might be relevant and admissible under an issue properly formed. *Ib.* 111.
 20. *Summons of third person, as claimant, or transferee*.—When the answer of a garnishee, admitting an indebtedness or liability, further states that a third person claims the debt, money or property (Code, §§ 2984-87), the plaintiff must bring in such adverse claimant by summons or notice, and can not try his right by contesting the answer of the garnishee. *Ib.* 111.
 21. *Deposit of money with third person for creditor*.—If a debtor deposits money with a third person, instructing him to pay it to another, no present consideration passing, the ownership of the money remains in the debtor himself until the beneficiary ratifies the act by accepting the money, or otherwise placing the depository in a position which might result in prejudice to him by a revocation of the act; and a ratification in such case relates back to the date of the deposit, changing the ownership from that time. *Truger, Canman & Co. v. Feibleman*, 60.
 22. *Same; garnishment against depository; ownership of money deposited*.—The ownership of the money so deposited remaining in the debtor, it is subject to garnishment in the hands of the depository; and if the debtor files an inventory of his property, on a contest of his claim of other property as exempt, while the money is yet in the hands of the depository, it may be that he should include it, stating the facts; but, if the money has been paid over to the creditor before demand for an inventory is made, the attaching creditor can not complain, nor insist that it be estimated as a part of the debtor's property. *Ib.* 60.

ATTORNEY AT LAW.

1. *Contract of employment of attorneys; fee contingent on success*. Attorneys having been employed by a voluntary association of persons engaged in the business of selling liquor by retail in a precinct in which a local prohibitory law or ordinance had been enacted, to represent any of them in their efforts to obtain a license; \$250 being paid in cash, and \$250 to be paid "whenever a license to sell liquor is obtained, or can be obtained in said precinct;" and having failed in their attacks on the law, in the several cases in which they appeared for their clients, can not recover the unpaid \$250 because the law was afterwards held

ATTORNEY AT LAW—CONTINUED.

- void in a prosecution against a person who has not a member of the association, and for whom they did not appear as counsel. *Cheney v. Kelly & Smith*, 163.
2. *Purchase by attorney at sale under execution in favor of lunatic client; offer to do equity by client seeking to enforce trust.*—When an attorney for a lunatic, or for his guardian, sues out an execution on a decree in the lunatic's favor, and becomes the purchaser at the sale, taking the sheriff's deed to himself, he becomes a trustee for the lunatic, and it is his duty to pay the accruing taxes on the land; and if he suffers the land to be sold for taxes, again becoming the purchaser himself, he can not claim that the lunatic, seeking to enforce the trust and obtain the legal title, should repay the costs of the tax proceedings, as a part of the offer to do equity. *Godwin v. Whitehead*, 409.
 3. *Stipulation in mortgage for payment of attorney's fees, or costs of collecting.*—When a mortgage contains a power of sale, and directs the proceeds to be devoted, first, "to the expense of advertising and selling, and all attorney's or solicitor's fees," while the secured note contains a provision that the mortgagor "shall pay all costs for collecting the above, not less than ten per cent., on failure to pay at maturity;" a sale being made under the power, the mortgagee can retain only a reasonable fee for attorney's services rendered in connection with the sale. *Tompkins v. Drennen*, 463.
 4. *Attorney's fees as damages.*—In an action on an attachment bond, attorney's fees for defending the attachment suit may be recovered as damages, if specially claimed; but an assignment claiming "special damages in the sum of one hundred dollars, in that by said attachment he was put to the expense of employing counsel to defend said attachment suit," is scarcely sufficient without a statement of some amount paid or incurred. *Crofford v. Vassar*, 548.

BAIL. See CRIMINAL LAW, 2, 3.

BANKS, AND BANKING.

1. *Discount of draft by banker, at usurious rate of interest.*—When a draft, having been accepted by the drawee for the accommodation of the drawer, is presented by the latter to the banker to whose order it is made payable, and who then advances the amount to him, deducting a certain per cent. in advance for the use of the money until the maturity of the draft, the transaction is a *discount* of the draft within the meaning of the statute which makes it a misdemeanor for any banker to "discount any note, bill of exchange or draft, at a higher rate of interest than eight per cent. *per annum*" (Code, § 4140); and if the sum deducted, excluding difference of exchange, is more than legal interest, the banker can not maintain an action against the acceptor, the contract being unlawful. *Youngblood v. Birmingham Trust Co.*, 521.
2. *Same; constitutionality of statute.*—The statute which make it a misdemeanor for "any banker" to discount any note, bill or draft at more than legal interest (Code, § 4140), applies to banking corporations as well as individual bankers, and is not an unlawful exercise of class legislation. *Ib.* 521.
3. *Embezzlement by bank officer.*—Under statutory provisions (Code, § 3796), a bank officer may be convicted of embezzling, or fraudulently converting to his own use, money belonging to the bank, or deposited therein, although his possession and

BANKS, AND BANKING—CONTINUED.

control was not exclusive of the other officers; it is immaterial whether his acts were perpetrated secretly or openly, with or without the assent and concurrence of the other officers; if consummated under the guise of a fraudulent loan, made with the assent of the other officers, and regularly credited on the books as an ordinary business transaction, this would not eliminate the criminality of the act; and the fraudulent intent may be inferred by the jury from the misappropriation of the funds. *Reeves v. State*, 31.

BILL OF EXCEPTIONS.

1. *Bill of exceptions not signed in term time, nor within time then allowed.*—When a bill of exceptions is not signed in term time, nor within the time then allowed by order of court for its preparation, but the transcript contains what are called "Judge's orders extending the time" from day to day, which purport to be signed by the presiding judge, though not a part of the record proper, nor made a part of the bill of exceptions, the bill will not be stricken from the record on motion. *M. & B. Railroad Co. v. Worthington*, 598.
2. *Costs of bill of exceptions.*—The bill of exceptions in this case purporting to set out substantially all the evidence, though no charge was given or asked as to the effect of the evidence, and being held unnecessarily long, the cost of copying it was equally divided between the parties, though the judgment was reversed and the cause remanded. *Ib.* 598.
3. *Documents copied in bill of exceptions.*—When the bill of exceptions states that certain papers or documents were read in evidence on the trial, and directs the clerk to insert them, but does not so describe them by identifying features as to leave no room for mistake by the transcribing officer, the documents inserted by him will not be considered a part of the bill of exceptions, but will be stricken out on motion; but, on the trial of a statutory claim suit, if the bill of exceptions states that the plaintiffs read in evidence the affidavit and attachment on which the suit was founded, and directs the clerk to insert them, this is sufficient to warrant their insertion, since it leaves no room for mistake. *Moore, Marshman & Co. v. Penn. & Co.*, 200.
4. *Exception to judgment, or conclusion of court on evidence.*—Under a statute which gives either party the right, "by bill of exceptions, to present for review on appeal the conclusions and judgment of the court upon the evidence," the appellate court can not revise the judgment unless a bill of exceptions was reserved. *Hall v. Mining & Man. Co.*, 461.
5. *Nonsuit with bill of exceptions.*—A statutory nonsuit with a bill of exceptions to a charge of the court to the jury is reversible in this court (Code, § 2759), but a nonsuit in consequence of rulings on the pleadings is not; and when the judgment-entry recites that the nonsuit was taken in consequence of both rulings, this court will consider only the correctness of the charge to the jury. *Dundee Mortgage & Trust Co. v. Nixon*, 318.

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Heading of note, as showing place of execution*—When a promissory note, in its heading, is dated at "Uniontown, Alabama," the presumption is that it was executed there; and this presumption must prevail, in an action on the note, in the absence of evidence to the contrary. *Dundee Mortgage & Trust Co. v. Nixon*, 318.
2. *Check or order of third person as payment.*—Where the plaintiff, desiring to purchase an overcoat, procured an order for one from

BILLS AND NOTES—CONTINUED.

a third person, and presented it to the tailor to whom it was addressed, who thereupon took it, and promised to make the overcoat; but, the drawer of the order having failed in business before the coat was finished, refused to deliver it without payment; *held*, that the plaintiff could not recover for a breach of contract, unless the evidence showed that the order was accepted as payment for the debt. *Williams v. Costello*, 592.

BILL OF PARTICULARS.

1. *Relevancy of evidence under.*—When plaintiff claims damages of the defendant railroad company for a breach of contract in refusing to let him build certain trestles which he had agreed to build, and in failing to furnish the necessary timber and materials within the time specified, whereby he "was delayed and put to great expense and trouble in the maintenance of necessary teams;" the bill of particulars, furnished on demand, containing items for "corn, oats and bran consumed," it is permissible for plaintiff to prove that it was necessary and proper to have teams for use on the work. *M. & B. Railroad Co. v. Worthington*, 598.
2. *Amendment of bill of particulars.*—In an action on an account for goods sold and delivered, a bill of particulars being furnished on demand, in which the account is made out in the name of plaintiff individually; if the complaint is then amended by averring that plaintiff sues as assignee of two successive partnerships with whom the account was contracted, a corresponding amendment may be made in the heading of the bill of particulars. *Boykin v. Persons*, 630.

BONDS.

1. *Bond construed as contract of suretyship, not as guaranty.*—A bond signed jointly by several persons, one of whom had been appointed an agent and collector of a private corporation, by written contract made a part of the bond, reciting that for value received, and in consideration of said contract, they "hereby guarantee to" said corporation "the full and faithful performance of said contract, including all damages which may result to said company from any failure on the part of said S. [collector] to perform any of the provisions of said contract, to the amount of \$1,000; hereby waiving any necessity on the part of said company of instituting legal proceedings against said S. before having recourse on us,"—binds the other obligors as sureties for S., and not as guarantors. *Saint v. Wheeler & Wilson Man. Co.*, 362.
2. *Refunding bond on dissolution of injunction.*—When a bill seeks to enjoin and stay proceedings on a judgment at law, it is error to dissolve the injunction on the denials of the answer, without requiring the execution of a refunding bond by the defendant (Code, § 3531); but the error will be corrected on appeal, and the decree affirmed as corrected. *Dexter v. Ohlander*, 467.
3. *Official bonds of sheriff as evidence.*—In an action (or summary proceeding) against a sheriff and the sureties on two official bonds given by him, pleas being filed by all of the defendants jointly, the bonds can not be excluded from the jury as evidence because two of the sureties on the first bond were not on the second. *Muthis v. Carpenter*, 156.
4. *Bond of indemnity as justifying or requiring levy.*—When an attachment is placed in the hands of a sheriff to be levied, a bond of indemnity given, and property pointed out which is *prima facie*

BONDS—CONTINUED.

subject to levy, he may nevertheless refuse to make the levy, if he is satisfied that the property is not liable; but proof of these facts makes out a *prima facie* case of liability against him, and imposes on him the *onus* of proving that the property was in fact not subject to levy. *Ib.* 156.

5. *Levy of second attachment on property in hands of sheriff under prior attachment; liability on bond of indemnity*—In an action by a sheriff on a bond of indemnity, which was given to procure the levy of an attachment on goods which were already in his possession under the levy of prior attachments, if it is shown that the levy was discharged by agreement between the plaintiff and the claimant of the goods, who thereupon released plaintiff from liability on account of the levy, but afterwards recovered a judgment against the sheriff; the defendants may show that the judgment was founded on the levy of the prior attachments, and a recovery can not be had against them, in any event, for more than nominal damages. *Smith v. Johnson*, 482.

CHAMPERTY. See CONTRACTS, 1.

CHANCERY.

JURISDICTION, AND GENERAL PRINCIPLES.

1. *Cancellation of conveyance; burden of proof as to mental soundness.* In a suit between the several children of a decedent, the complainant seeking the cancellation of certain conveyances executed by the decedent in his life-time to the several defendants, on the ground that he was of unsound mind at the time of their execution, the presumption being in favor of sanity, the *onus* is on the complainant to overcome it by at least a preponderance of the evidence. *Chancellor v. Donnell*, 342.
2. *Removal of administration into equity.*—The administration and settlement of a decedent's estate is a single continuous proceeding, and when removed into equity for any purpose that court must proceed to a final and complete settlement of all matters involved, including the widow's petition for an allotment of homestead, or other lands in lieu of homestead. *Tygh v. Dolan*, 269.
3. *Assignment of dower in equity.*—When dower can not be assigned by metes and bounds, a court of equity has exclusive jurisdiction to make an assignment. *Ib.* 269.
4. *Authority of judge of City Court of Montgomery to grant injunction.* The judge of the City Court of Montgomery has authority, equally with a circuit judge or chancellor, to grant an injunction in a case pending in Colbert county. *Ex parte Sayre*, 288.
5. *Injunction against trespass.*—As a general rule, a court of equity will not grant an injunction to restrain the commission or repetition of a trespass, when the trespasser is solvent, and an action at law for damages affords an adequate remedy; but there are injuries, sometimes arising from the peculiar nature or use of the property, which can not be adequately compensated by an action at law for damages; and when the injuries are continuous, or permanent in their effects, destroying the substance of the inheritance, ruining the estate, or permanently impairing its future use and enjoyment in the manner in which the owner has been accustomed to use and enjoy it, pecuniary compensation is inadequate, and an injunction will be awarded. *Hooper v. Dorn Coal Mining Co.*, 235.
6. *Same.*—A court of equity will grant an injunction at the suit of

CHANCERY—CONTINUED.

the owner of the surface of lands which are valuable for agricultural and grazing purposes, against the owner of the minerals and mineral rights, to restrain him from depositing on the land foul water, slate, and other noxious substances brought up through the opening from subjacent lands which he is mining. *Ib.* 235.

7. *Injunction for abatement of nuisance.*—An injunction for the abatement of a private nuisance is not a matter of absolute right, but rests in judicial discretion, to be exercised according to the settled principles which regulate the interference of the court in such cases, having regard, on the one hand, to the right of every person to use his own property as his taste, desires and interest may dictate, and, on the other, to the right of his neighbors to the comfortable and unmolested use and enjoyment of their property; and it should only be granted "when imperatively necessary to prevent multiplicity of suits, irreparable injury, or continuous or constantly recurring injuries, for which legal remedies are inadequate to afford full redress." *English v. Electric Light & Motor Co.*, 259.
8. *Injunction against industrial enterprises of public utility in city.* When an injunction is sought against an industrial enterprise of public utility in a city, the abatement of which as a nuisance would entail heavy loss on the owners and injury to the citizens generally by increased cost of light, or otherwise, the court will exercise its power cautiously and sparingly, and will require the complainants to show a case of imperative necessity by clear and convincing evidence; and when the evidence shows, as in this case, that the noises, smoke, soot and vibrations caused by the operation of the defendant's machinery and works, which are complained of, have been greatly reduced by the introduction of improved machinery and appliances, and may be further lessened at small expense to the complainants, until brought within the ordinary discomforts and inconveniences incident to a city life, the court will refuse to interfere by injunction, and will leave the parties to seek compensation by an action law for damages caused by an increased risk of fire, danger of explosion, depreciated value of property, and increased rate of insurance. *Ib.* 259.
9. *Sale under power in mortgage; purchase by mortgagee.*—A sale of lands under a power in a mortgage, in substantial compliance with its terms, cuts off the equity of redemption as effectually as a decree of foreclosure, leaving nothing in the mortgagor but the statutory right of redemption, and the right to disaffirm the sale if the mortgagee himself became the purchaser at the sale without express authority given by the mortgage; but, if the mortgagor elects to disaffirm the sale on that account, his election must be accompanied with an offer to redeem by paying the amount due. *Mortgage Companies v. Turner*, 272.
10. *Rents accruing after sale under power in mortgage; when purchaser is entitled to receiver.*—The purchaser at a sale under a power in a mortgage is entitled to the rents subsequently accruing, even though he be the mortgagee, and was not authorized to purchase; and if the mortgagor and his tenants refuse to attorn to him, are insolvent, and are disposing of the crops, he is entitled to a receiver. *Ib.* 272.
11. *Mortgagee's right, after purchase at sale under power, to injunction and receiver in aid of ejectment; appointment of receiver without notice.*—A mortgagee of lands, having become the purchaser at

CHANCERY--CONTINUED.

- a sale under the power, but without express authority conferred by the mortgage, and having brought ejectment to recover the possession of the land, may come into equity for an injunction to prevent the mortgagor and a person holding under him by fraudulent conveyance from disposing of the crops, and for a receiver to take possession, gather and hold the crops, on averment that the land is not worth the amount of the mortgage debt, that the defendants are insolvent, and that they have removed and disposed of part of the crops; and a receiver may be appointed without notice, complainant being required to execute a proper bond. *Hendrix v. Amer Fr. Mortgage Co.*, 313.
12. *Sale under decree of foreclosure; personal decree for balance of debt.* Under a decree for the foreclosure of a mortgage, if the proceeds of sale of the mortgaged property do not satisfy the decree in full, the mortgagee is entitled to a personal decree for the unpaid balance (Code, § 3805); but, if the decree is satisfied in full, he can not have a personal decree for a balance reported in his favor by the register under the statement of an account between the parties relative to matters outside of the mortgage. *Perdue v. Brooks Bros.*, 611.
 13. *Receiver between partners.*—In a suit for the settlement of partnership accounts, a receiver will not be appointed at the instance of complainant, when the defendant, who has possession of all the property alleged to belong to the partnership, denies the existence of any partnership, and is entirely solvent and able to respond in damages. *Irwin v. Everson*, 84.
 14. *Reformation of written instrument in equity.*—To authorize the reformation of a written contract on oral evidence, requires very great particularity of averment and very clear proof. *Dexter v. Ohlweiler*, 467.
 15. *Rescission of contract, at instance of purchaser, on ground of fraud.* A court of equity will not decree the rescission or cancellation of a contract for the sale of land, at the instance of the purchaser, on account of fraudulent misrepresentations made by the vendor, upon a bare probability, or mere preponderance of the evidence, but requires the complainant to establish his case by clear and convincing evidence. *Howle v. N. Birmingham Land Co.*, 389.
 16. *Same; laches.*—The purchaser of land, claiming a rescission of the contract on the ground of fraud, must act with promptness on its discovery; and when he delays for three years, as in this case, and then sets up the fraud in defense of a bill to enforce a vendor's lien, relief will be refused on account of the laches. *Ib.* 389.
 17. *Specific performance of parol gift of land.*—A court of equity will not enforce, against the executors and heirs of the deceased donor, the specific execution of a parol gift of land, where it appears that the donor placed the donee in possession, under the declared intention of giving the land to him, and afterwards requested or verbally directed his executors to execute a deed to him, and that the donee erected some improvements of inconsiderable value. *Tolleson v. Blackstock*, 510.
 18. *Transactions between parties occupying fiduciary relations towards each other.*—The general principles which a court of equity applies to transactions between persons occupying fiduciary relations towards each other, is not confined to cases in which there is any formal or technical fiduciary relation, such as guardian and ward, parent and child, client and attorney, &c., but extends

CHANCERY—CONTINUED.

- to all cases in which confidence is reposed by one party in the other, and the trust is accepted, under circumstances which show that the confidence was founded on the intimate personal and business relations existing between the parties, which gave the other party an advantage or superiority; and in such cases, the *onus* is on the party in whom the confidence is reposed to show that no fraud, undue influence, or other improper motive entered into the transaction, but that it was the voluntary act of the other party, fully understood by him, and his understanding of it fully expressed in the writings which he signed. *Kyle v. Perdue*, 579.
19. *Same; case at bar; conveyance cancelled*.—In this case, the instrument assailed by the grantor, an old woman in feeble health, by which she conveyed all her property to the grantees, wealthy men engaged in active business pursuits, in trust that they should take charge of the property, collect the rents, make necessary repairs, pay taxes out of the rents collected, and pay the residue to the grantor during her life, was set aside and cancelled at her instance, on evidence showing that, although they had not solicited her to make any conveyance of her property to them, they were her intimate friends, whom she consulted in all business affairs, and who represented to her, at the time when she signed the conveyance, that it bound them to support and maintain her during life, while in fact it only bound them to apply the surplus income of her own property, after payment of repairs and taxes, to her support. *Ib.* 579.
 20. *Same; ratification*.—When the grantor in a written instrument, which conveys all her property to the grantees in trust, partly, for her support and maintenance, files a bill to set it aside, her receipt of money for her support from the grantees, pending the suit, does not conclude her as a ratification of the instrument, when it appears that her necessitous circumstances compelled the acceptance of the money, one of her receipts stating, "I take this money because I am starving." *Ib.* 579.
 21. *Purchase by attorney at sale under execution in favor of lunatic client; offer to do equity by client seeking to enforce trust*.—When an attorney for a lunatic, or for his guardian, sues out an execution on a decree in the lunatic's favor, and becomes the purchaser at the sale, taking the sheriff's deed to himself, he becomes a trustee for the lunatic, and it is his duty to pay the accruing taxes on the land; and if he suffers the land to be sold for taxes, again becoming the purchaser himself, he cannot claim that the lunatic, seeking to enforce the trust and obtain the legal title, should repay the costs of the tax proceedings, as a part of the offer to do equity. *Godwin v. Whitehead*, 409.
 22. *Trust for person of weak mind, voluntarily assumed*.—The relation of voluntary trustee and *cestui que trust*, as between the maker of a note under seal and his sister, a woman of weak understanding, is not established by proof of the facts, that on the sale and distribution of their father's estate, many years before, one of the executors, another brother, retained his sister's share of the proceeds in his own hands for her, she being then a minor and having no legal guardian, and, on a subsequent sale of his property to the maker of the note, preparatory to his removal from the State, the latter assumed the debt as part of the price to be paid, and executed the note payable to the sister for it. *Cameron v. Cameron*, 344.
 23. *Testamentary trusts; equitable jurisdiction over trustee*.—A court of

CHANCERY—CONTINUED.

equity has undoubted jurisdiction, at the instance of the widow and children of a testator, to compel the executor, as testamentary trustee, to make a suitable provision for them out of the income of the estate, according to the terms and spirit of the will, notwithstanding the general discretionary powers given to the trustee in the management of the estate. *Ward v. Ward*, 331.

24. *Same; allowance to beneficiaries for support and maintenance; pleading and practice.*—Under a bill filed by the widow and minor children of the testator, beneficiaries under his will, seeking to remove the administration of the estate into equity, and asking relief against the executor as testamentary trustee; a petition being filed praying an allowance out of the estate for the support and maintenance of the complainants and the education of the children, and a reference to the register being ordered to ascertain what would be a reasonable allowance; if the widow then withdraws from the cause as a party, electing to dissent from the will, the complainants can not then complain, nor can the widow or children separately complain, that the chancellor refused to act on the register's report as to what would be a reasonable allowance for their joint support as prayed in the petition. *Id.* 334.
25. *Contest of will in equity.*—Under statutory provisions regulating the probate and contest of wills (Code, §§ 1987–89, 2000), a person interested in the estate who did not contest the will offered for probate, although he employed counsel, and was examined as a witness for the contestant, may contest it by bill in chancery at any time within five years. *Knox v. Paul*, 505.
26. *Fraudulent promise to make will.*—If a person procures the execution of a conveyance of land by promising to devise the land by will to the grantor, having at the time the intention not to do so, and afterwards dies intestate, the fraud will vitiate the transaction, and a court of equity will grant relief against the conveyance; but the fraud must be established by clear and convincing evidence, and relief must be sought seasonably after the discovery of the fraud; and the subsequent breach of promise, by failing and refusing to execute such will, is not, of itself, conclusive or sufficient evidence that the promise was made with a fraudulent intent. *Manning v. Pippen*, 537.
27. *Same; allegations as to discovery of fraud.*—The bill being filed by the husband, against the heirs at law of his deceased wife, seeking relief against a conveyance of land, which he had executed to her, as alleged, in consideration of her fraudulent promise to devise it to him by will, and alleging that "the fact that it was her intention at the time not to comply with her said promise, and that she was employing a mere stratagem, and the evidence of such intention, did not become known to your orator until he filed his original bill in this cause, though he made repeated and diligent inquiry in reference thereto;" these averments do not meet the strict requirements of the rule applicable in such cases, because they do not show how the fraud was discovered, nor why it was not discovered sooner. *Id.* 537.
28. *Same; laches*—The lapse of sixteen years after the alleged promise was made, during which period the wife repeatedly refused to execute her will as promised, bars any right to relief against her heirs after her death, even if the averments of the bill were fully and precisely proved. *Id.* 537.

CHANCERY—CONTINUED.

PLEADING AND PRACTICE.

29. *Parties to suit for distribution and settlement of trust fund; decrees in favor of persons not parties of record.*—Any number of the beneficiaries of a trust fund may maintain a suit to bring the trustee to a settlement, without joining the others; and any judgment creditor may file a bill to set aside a fraudulent conveyance executed by his debtor, without joining other creditors as complainants with him; and the court may, in either case, render decrees in favor of persons who are not named as complainants in the bill. *Thornton v. Tison*, 589.
30. *Parties to bill for administration of estate; intervention by petition.* The widow of a testator having filed a bill, jointly with her children, for the removal of the administration from the Probate Court, and other relief against the executor as testamentary trustee, and having then withdrawn from the case as a party, and elected to dissent from the will, is nevertheless a necessary party to the bill, and can not intervene by petition, asking to have her dower and distributive interest in the estate allotted to her. *Ward v. Ward*, 331.
31. *Filing claims against decedent's estate in equity, under order of court; revivor of claim; mandamus.*—When the administration of a decedent's estate has been removed into equity, under bill filed by the administrator, and that court has made an order requiring creditors to file their claims within a specified time; if a creditor's claim is filed, proved, reported valid by the register under a reference, and his report confirmed without objection; and the creditor then moves to set aside the order requiring claims to be filed, but dies before his motion is acted on, and before formal decree has been entered allowing his claim, his personal representative, or the succeeding administrator *de bonis non* of the estate which he represented, may intervene by motion or petition, for the purpose of prosecuting the claim and the pending motion to a final determination; and if his motion or petition is overruled and refused, this court will award a *mandamus* to compel its allowance. *Keynolds v. Crook*, 570.
32. *Inconsistent prayers for relief; relief under general prayer.*—If a creditor, filing a bill to set aside an alleged fraudulent conveyance by his debtor, and to subject the property conveyed to the payment of his debt, may also ask, in the alternative, to hold the purchaser liable for a balance of purchase-money paid after bill filed and process served (which is not decided), he can not have that relief under the general prayer. *Pattison v. Bragg*, 55.
33. *Demurrer good only in part.*—A demurrer which is good in part only, should be overruled entirely. *Godwin v. Whitehead*, 409.
34. *Correspondence of pleadings and proof; variance.*—The rule of equity pleading which requires that the pleadings and the proof shall correspond is applied with the greatest strictness to bills for the specific performance of contracts, extending even to redundant and superfluous averments with respect to a material fact, or descriptive of a matter or thing necessary to be alleged; as in this case, where the bill was filed by the heirs of a deceased purchaser of land to enforce a specific execution of the contract, alleging that he received the joint title-bond of the two vendors, while the evidence showed that the bond was executed by one of them only, and the variance was held fatal to relief. *McDonald v. Walker*, 172.
35. *Fiat for injunction before bill filed.*—A fiat for an injunction granted by the judge to whom the bill is presented before being filed in

CHANCERY—CONTINUED.

court, is not void, but a mere irregularity; and the irregularity is waived by a motion to dissolve the injunction after answer filed. *Ex parte Sayre*, 288.

36. *Dissolving or discharging injunction in vacation*.—A motion to dissolve an injunction, either for want of equity in the bill, or on the denials of the answer, may be made and acted on in vacation (Code, § 3532); but the statute does not apply to a motion to discharge an injunction, nor authorize the chancellor to discharge it in vacation. *Ib.* 288.
37. *Refunding bond on dissolution of injunction*.—When a bill seeks to enjoin and stay proceedings on a judgment at law, it is error to dissolve the injunction on the denials of the answer, without requiring the execution of a refunding bond by the defendant (Code, § 3531); but the error will be corrected on appeal, and the decree affirmed as corrected. *Dexter v. Ohlander*, 467.

CHARGE OF COURT TO JURY.

1. *Charge as to weighing evidence or counting witnesses*.—A charge instructing the jury that is their duty to weigh the evidence, and not merely to count the witnesses, is not erroneous, nor liable to cause injury. *K. B. & M. Railroad Co. v. Crocker*, 412.
2. *Charge too favorable to party excerpting*.—When the defense of contributory negligence is not presented by the pleadings, the defendant can not complain of a charge which "leaves it to the jury to say whether, under the evidence in the case, the plaintiff was guilty of contributory negligence." *Ib.* 412.
3. *Charge as to conflicting evidence*.—A charge instructing the jury, where the evidence is conflicting on material facts, that if they can not say who has told the truth, then they must find the facts so far as there is conflict not proved, and if such facts are necessary to be proved in order for the plaintiff to recover, they must find for the defendant, is properly refused. *Ib.* 412.
4. *Charge as to sufficiency of evidence*.—A charge instructing the jury that it is incumbent on the plaintiff to prove that the property sued for belonged to him when the suit was brought and that the defendant had no title or interest in it, and no right to detain it, is properly refused. *Bruce v. Bruce*, 563.
5. *Charge as to explanation of "suspicious circumstance"*.—A charge requested on the contested probate of a will, instructing the jury that, if the proponents and principal beneficiaries under its provisions had a "controlling agency in procuring its execution, it is universally regarded as a very suspicious circumstance, and requiring the fullest explanation," requires too high a degree of proof, and is properly refused. *Knox v. Knox*, 495.
6. *Charge as to construction of writing*.—It is the duty of the court to construe a written instrument, and a charge asked which submits its construction to the jury is properly refused. *Davis v. Badders & Britt*, 348.
7. *Presumption in favor of ruling of primary court refusing charge asked*.—When the bill of exceptions does not purport to set out all the evidence, the appellate court will presume that there was evidence which justified the refusal of a charge asked, if any state of proof would have justified its refusal. *Ib.* 348.
8. *Charge submitting question of law to jury*.—If the court improperly submits to the jury the decision of a question of law, as if it was a question of fact, and the jury decides it as the court should have done, the error is without injury, and constitutes no ground of reversal. *Saint v. Wheeler & Wilson Man. Co.*, 362.

CHARGE OF COURT TO JURY—CONTINUED.

9. *Charge given, but not handed to jury.*—If an erroneous charge, requested by the defendant, is marked *Given* by the presiding judge, but by mistake is placed among the charges refused, and does not go into the hands of the jury, there is nothing in this of which the defendant can complain. *Reeves v. State*, 81.
10. *Charge as to validity of verbal contract.*—In an action for a breach of contract which, under the law or the express agreement of the parties, was required to be in writing, a charge instructing the jury that "a verbal contract is as valid and binding as a written one" would be reversible error; but, where there is evidence tending to show a waiver of the stipulation by the party for whose benefit it was intended, such a charge is misleading only, and subject to explanation, but does not constitute reversible error. *M. & B. Railroad Co. v. Worthington*, 598.
11. *Charge as to reasonable doubt and probability of innocence.*—A charge asked in a criminal case, instructing the jury that "a reasonable doubt of the defendant's guilt is not the same as a probability of his innocence, but may exist when the evidence fails to convince the jury that there is a probability of defendant's innocence," asserts a correct legal proposition, is not ambiguous, argumentative or misleading, and its refusal is reversible error. *Croft v. State*, 3.
12. *Reasonable doubt, to justify an acquittal in a criminal case,* implies more than "if it is possible, or it may be, or perhaps the defendant is not guilty;" and a charge asked, which uses those terms as the equivalent of reasonable doubt, is properly refused. *Young v. State*, 5.
13. *Charge ignoring fault in bringing on difficulty.*—A charge requested on a trial for murder, which claims an acquittal on certain facts hypothetically stated, but ignores other evidence tending to show that the defendant was not without fault in bringing on the difficulty, is properly refused. *Ib.* 5.
14. *Recalling jury; error without injury.*—The defendant can not complain of any error or irregularity on the part of the court below in recalling the jury and giving them additional instructions, when the record shows that the court might have instructed the jury, without hypothesis, to find for the plaintiff. *Cowen v. Eartherly Hardware Co.*, 324.
15. *General charge on evidence.*—When the plaintiff's claim is admitted, and the evidence adduced by the defendant would not authorize a verdict in his favor on the attempted defense, the court may instruct the jury, without hypothesis, to find for the plaintiff; and may, also, refuse to instruct them that, "if they do not believe the evidence, they must find for the defendant." *Ib.* 324.
16. *Same.*—In an action against a railroad company to recover damages for killing stock, proof of the killing makes out a *prima facie* case for the plaintiff, and the sufficiency of the evidence to rebut the presumption of negligence is a question for the jury; hence, the general charge in favor of the defendant is properly refused. *S. & W. Railroad Co. v. Jarvis*, 149.
17. *Same.*—In an action against a railroad company to recover damages for injuries to several mules, which were run over by a freight train before daybreak one frosty morning, as the train was crossing a trestle over a small creek, the defendant is entitled to the general affirmative charge on the evidence, when

CHARGE OF COURT TO JURY—CONTINUED.

the engineer of the train testifies that he did not see the animals until he was within ten feet of them, and could not see them sooner because of a dense fog, about one hundred yards wide, which covered the track at that point, extending up and down the creek; there being no evidence in conflict with his testimony, and none which authorized an inference inconsistent with it. *Central Railroad Co. v. Ingram*, 152.

18. *Same*.—When the lands sued for are described in the complaint only by their government numbers and subdivisions, and, the plaintiff producing no paper title, his witnesses testify to his prior possession of "the upper place" and "the lower place," not identifying them as the lands sued for, the court is not authorized to give the general charge in his favor, although no objection was made by the defendant to the relevancy or sufficiency of the evidence. *Duntun v. Keel*, 159.
29. *General charge on evidence*.—The proper test as to whether the court should give the affirmative charge seems to be, whether the court would be justified in sustaining a demurrer to the evidence. *Bromley v. B. Mineral Railroad Co.*, 397.

CODE OF ALABAMA.

1. § 253. Filing oath of deputy-sheriff. *Mathis v. Carpenter*, 159.
2. § 1144. Duties of railroad engineer. *S. & W. Railroad Co. v. Meadors*, 137; *S. & W. Railroad Co. v. Jarvis*, 149; *Central R. & B. Co. v. Ingram*, 152.
3. § 1370. Partition fences. *Garrett v. Sewell*, 456.
4. §§ 1587-8. Branch railroads. *Arrington v. S. & W. Railroad Co.*, 434.
5. § 1732. Contracts required to be in writing. *Clanton v. Scruggs*, 279; *Manning v. Pippen*, 537.
6. § 1737. General assignments. *Ellison v. Moses*, 221.
7. §§ 1810-11. Unrecorded mortgages. *Steiner Bros. v. Clisby*, 91.
8. § 1823. Attornment of tenant to new landlord. *Mortgage Companies v. Turner*, 272.
9. § 1845. Parol trusts in land. *Manning v. Pippen*, 537; *Ellison v. Moses*, 221.
10. § 2000. Contest of will in equity. *Knox v. Paull*, 505.
11. § 2083. Filing claims against decedent's estate. *Agnew v. Walden & Son*, 108.
12. § 2098. Administrator's duty to gather growing crop. *Marks v. Nelms*, 304.
13. § 2265. Revivor of actions against administrator. *Reynolds v. Crook*, 570.
14. § 2280. Action on judgment against decedent. *Reynolds v. Crook*, 570.
15. § 2322. Divorce on ground of abandonment. *Jones v. Jones*, 443.
16. § 2333. Alimony to wife on divorce. *Jones v. Jones*, 443.
17. §§ 2341-51. Actions between husband and wife. *Bruce v. Bruce*, 563.
18. § 2356. Insurance of husband's life for benefit of wife or family. *Craft & Co. v. Stoutz*, 245.
19. § 2508. Alienation of homestead. *Turner v. Bernheimer*, 241; *Hodges v. Winston*, 514.
20. §§ 2521-25. Claim of exemption, and contest thereof. *Bledsoe v. Gary & Kennedy*, 70; *Trager, Canman & Co. v. Feibleman*, 60.
21. §§ 2590-1. Liability of master for injury to servant. *Bromley v. B. Mineral Railroad Co.*, 397; *K. M. & B. Railroad Co. v. Crocker*, 412.

CODE OF ALABAMA—CONTINUED.

22. § 2603. Abatement and revivor of actions. *Reynolds v. Crook*, 570.
23. § 2611. Citation to adverse claimant in detinue. *Behr v. Gerson*, 438.
24. § 2628. Partial payment avoiding statute of limitations. *Cameron v. Cameron*, 344.
25. § 2685. Plea of tender. *Hanson v. Todd*, 328.
26. § 2690. Specification of grounds of demurrer. *Smith v. Dick*, 311; *Dunder Mortgage & Trust Co. v. Nixon*, 318.
27. §§ 2717-20. Statutory detinue. *Behr v. Gerson*, 438.
28. § 2759. Nonsuit with bill of exceptions. *Dundee Mortgage Co. v. Nixon*, 318.
29. § 2858. Security for costs by non-residents. *Rosenberg v. Clafin Co.*, 249.
30. § 2876. Rehearing at law. *Seymour v. Farquhar & Son*, 526.
31. §§ 2945-6. Garnishment. *Donald Bros. v. Nelson & Sons*, 111; *Ensley Furnace Co. v. Rogan & Co.*, 594.
32. § 2956. Levy of attachment by constable. *Joseph v. Henderson*, 214.
33. §§ 2984-7. Summons of transferree or claimant. *Donald Bros. v. Nelson & Sons*, 111.
34. § 2995. When cause stands for trial. *Rosenberg v. Clafin Co.*, 249.
35. § 2999. Amendment of affidavit for attachment. *Rosenberg v. Clafin Co.*, 249.
36. § 3007. Statutory claim suit; assessing value of property. *Vaught v. Ohemig & Wehl*, 306.
37. § 3056. Landlord's lien for rent and advances. *Mortgage Companies v. Turner*, 272.
38. §§ 3069-70. Landlord's lien on goods. *McKleroy v. Cantey & Randolph*, 295; *Aderhold v. Blumenthal & Beckert*, 66.
39. § 3221. Arbitration of pending suit. *Davis v. Badders & Brill*, 348.
40. §§ 3380-1. Forcible entry and detainer. *Espalla v. Gottschalk*, 254.
41. § 3531. Refunding bond on dissolution of injunction. *Dexter v. Ohlander*, 467.
42. § 3605. Personal decree on foreclosure. *Perdue v. Brooks Bros.*, 611.
43. § 3613. When appeal lies. *Ex parte Sayre*, 288.
44. § 3687. Sheriff's commissions on sales. *Rolling Stock Co. v. Clark & Co.*, 322.
45. § 3796. Embezzlement by bank officer. *Reeres v. State*, 31.
46. § 3832. Confession of judgment for fine and costs. *Ex parte Davis*, 9.
47. § 4037. Indictment for selling liquor unlawfully. *Compton v. State*, 25.
48. § 4095. Shooting along public road. *McDude v. State*, 28.
49. § 4140. Usury by banker. *Youngblood v. Birmingham Trust Co.*, 521.
50. §§ 4233, 4274, 4279-82. Justice of the peace acting outside of his beat. *Ex parte Davis*, 9.

COMMON LAW.

1. *Presumption as to; liability of employer for injuries to employe.*—The common law, which is presumed to exist in a sister State in the absence of evidence to the contrary, did not give an action for damages against the employer, where death resulted to an employe from the culpable negligence of a co-employe. *Kahl v. M. & C. Railroad Co.*, 337.

CONSTITUTIONAL LAW.

1. *State's proprietary right in and to oyster-beds and oysters.*—The State of Alabama owns the absolute property in the oyster-beds and oysters in her navigable waters, holding it in trust for the use and benefit of her people, subject only to the paramount right of navigation; and in the exercise of her property rights, she may, by legislative enactment, grant or give away the right to take oysters, restricting the grant to her own citizens, and qualifying the exercise of it by them by limitations as to time and manner of taking, selling, or transporting, until the oysters have become an article of inter-state commerce, and as such subject to the laws of the United States. *State v. Harrub*, 176.
2. *Same; when oysters become articles of inter-state commerce.*—Oysters taken from the beds within the limits of Alabama, by the persons to whom the qualified right is granted by legislative enactment, do not become articles of inter-state commerce until they have been shelled, and their transportation into another State has been begun. *Ib.* 176.
3. *Constitutionality of law "regulating the planting and taking of oysters in the waters of this State."*—The statute approved February 18th, 1891, entitled "An act to regulate the planting and taking of oysters in the waters of this State" (Sess. Acts 1890-91, pp. 1072-84), is not an unlawful attempt to regulate inter-state commerce; nor is it violative of the constitutional provision which requires that each law shall "contain but one subject, which shall be clearly expressed in its title," each of the provisions contained in it being cognate and referable to the subject expressed in the title. *Ib.* 176.
4. *Fine and forfeiture fund; constitutionality of law changing disposition of, as against registered claims*—The fund arising from fines and forfeitures in the several counties is the creature of statute, and is subject at all times to legislative control, as to the claims to be paid out of it, their preferences, and other conditions of payment; and the holder of claims, which have been duly registered under existing statutes, does not thereby acquire such a vested right to share in the fund as to exempt the claims from a subsequent statute changing the priority and mode of payment. *Harold v. Herrington*, 395.
5. *Same; act of Feb. 9th, 1891, regulating fund in Conecuh and Escambia counties.*—The statute approved February 9th, 1891, "to regulate the fine and forfeiture fund of Conecuh and Escambia counties, and the disposal of moneys arising from fines, forfeitures and convict labor in said counties" (Sess. Acts 1890-91, pp. 494-5), which requires that the money belonging to the fund shall be held subject to the order of the County Commissioners, that they shall advertise for bids from the holders of claims, and award the money to the highest bidder, is not violative of any rights acquired by the holders of claims which, by being duly registered under former statutes, had acquired a priority or preference over claims subsequently registered, nor otherwise unconstitutional. *Ib.* 395.
6. *Foreign corporations doing business here; constitutional and statutory restrictions.*—The constitutional and statutory restrictions imposed on foreign corporations doing business in Alabama do not apply to every act done by such corporations here, but do apply to a loan of money here by a foreign corporation engaged in the business of lending money on mortgage, and prevent a recovery by the corporation on a note given for the money borrowed, when a failure to comply with those provisions is shown. *Dundee Mortgage & Trust Co. v. Nixon*, 813.

CONSTITUTIONAL LAW—CONTINUED.

7. *Legislative act granting divorce; constitutionality of.*—Under constitutional provisions now of force, unlike those formerly existing, there is no express limitation of the power of the General Assembly to grant a divorce by legislative act; but the provision which declares that "no *special* or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by a general law, or where the relief sought can be given by any court of this State" (Art. iv, § 23), applies to proceedings for divorce, which are regulated by the general statutes, and renders void any legislative act granting a divorce to a particular person, whether on any of the grounds specified in the statutes, or any other ground whatever. *Jones v. Jones*, 443.
8. *Discount of draft by banker, at usurious rate of interest*—The statute which make it a misdemeanor for "any banker" to discount any note, bill or draft at more than legal interest (Code, § 4140), applies to banking corporations as well as individual bankers, and is not an unlawful exercise of class legislation. *Youngblood v. Birmingham Trust & Sav. Co.*, 521.
9. *Municipal charter; ordinance imposing imprisonment "until fine and cost are paid"*—A provision in a municipal charter authorizing the corporate authorities, on non-payment of the fine and costs on conviction for the violation of an ordinance, to impose hard labor or imprisonment "until the fine and costs are paid," is violative of the constitutional provision which prohibits imprisonment for debt. *Ex parte Russellville*, 19.

CONTRACT.

1. *Champertous contract.*—Champerty is a good defense to an action founded on the champertous contract, and may be claimed by demurrer or answer, as the facts may or may not appear on the face of the bill or complaint; but a stranger to the contract can not set up the champerty in defense of an action by a third party to enforce rights acquired under it. *Sibley v. Alba*, 191.
2. *Contract for service of jack to mare*—Under a contract for the service of a mare by a jack, "to insure or no pay, and if mare is sold, the money is due at the time of the sale," the money becomes due at the time of the sale, whether the mare is with foal or not. *Redwine v. Sides*, 567.
3. *Contract for services in recovering stolen property.*—Under a contract between the superintendent of a railroad company and a detective officer, by which the former promised to pay the latter the reasonable value of his services in the discovery and prosecution of persons who had stolen goods from the cars of the railroad company, and the recovery of the goods; a recovery can not be had on evidence showing that the goods recovered belonged to another railroad company, and that the thieves were convicted of larceny from the cars of that other company. *L. & N. Railroad Co. v. Morgan*, 605.
4. *Contract of employment by the month; charge as to construction of contract.*—A contract of employment at so much per month, with no stipulation as to the term of service, is determinable at the end of any month, at the pleasure of either party; and where plaintiff sues for the breach of a contract of employment, claiming that he was employed for a year, at stipulated monthly wages, while defendant claims that he "was only employed by the month, and for one month at a time," a charge instructing the jury that if the employment was not intended

CONTRACT—CONTINUED.

- to be for a month only, then a reasonable construction would be that it was for a year, is erroneous. *Clark v. Ryan*, 406.
5. *Drunkenness as cause for discharge of employe, and how proved.* When habitual drunkenness on the part of plaintiff, and consequent negligence and inattention to business, are set up in defense of an action for a breach of contract in discharging him before the expiration of the stipulated term of service, defendant may prove "that plaintiff was given to the excessive use of intoxicating liquors," but not "that he had been indicted in the courts of the county for the offense of public drunkenness." *Ib.* 406.
 6. *Alteration of written contract by parol.*—Under a written contract by which plaintiffs undertook to build a house for defendant according to certain specifications, and at a specified price, containing a stipulation that "no new work done on the premises shall be considered as extra, unless a separate estimate in writing for the same, before its commencement, shall have been submitted by the contractor to the proprietor, and his signature obtained thereto;" the parties may, by mutual assent given verbally, make changes and alterations in the plan as the work progresses; and the work being done as thus agreed on, a recovery may be had for it, either at the price agreed on, if any, or its value, without proof of any written estimate as required by the original contract. *Davis v. Badders & Britt*, 348.
 7. *Acceptance of work done under special contract.*—Under a count on a special written contract for building a house, a recovery can not be had without proof of full performance according to its terms; but a recovery may be had under the common count for work, labor and materials, on proof that defendant moved into the house before completion, continued to occupy it after the contractor quit working on it, and that it was of benefit to him. *Ib.* 348.
 8. *Damages for delay in completion of work.*—In an action on a contract for the building of a house, or the performance of other work, the defendant can not claim damages for delay in the completion of the work, when the evidence shows that, by consent, changes were made in the plans and specifications after the commencement of the work, which required a longer time for its completion. *Ib.* 348.
 9. *Production of architect's certificate; recovery under special and common counts.*—When the contract requires that the plaintiff, claiming the last installment of the agreed price, shall produce the architect's certificate as to the full and proper completion of the house, or other work to be done, it may be that a recovery can not be had under a special count on the contract, without proof that the certificate was procured, or that it was obstinately or unreasonably withheld; but a recovery may be had under the common counts, for work and labor done and materials furnished, on proof of its acceptance and its value, without regard to the architect's certificate. *Ib.* 348.
 10. *Giving bond as part of contract; evidence as to.*—When a material issue is whether plaintiff performed work for the defendant railroad company as an original contractor or as a sub-contractor under another person, the defendant may prove the fact that he gave no bond for the faithful performance of the work, bonds being required of contractors, and of them only. *M. & B. Railroad Co. v. Worthington*, 598.
 11. *Relevancy of evidence as to contract vel non.*—The question at issue

CONTRACT—CONTINUED.

being whether plaintiff, in performing work on railroad trestles, was an original contractor with the railroad company or a subcontractor under one P., the defendant company may prove the fact that, during the performance of the work, he received instructions and directions from P. without objection. *Ib.* 598.

12. *Publication for bids as evidence of contract vel non.*—Where plaintiff sues for the breach of an alleged contract with a railroad company for the construction of trestles, and the defendant denies that any contract was ever consummated between them, the publication for bids for the doing of the work, signed by the chief engineer, is admissible as evidence for either party: for the plaintiff, as showing that the approval of the contract by the president of the company was not required; and for the defendant, as showing that security was required for the prompt and faithful performance of the work, which plaintiff had never given. *Ib.* 598.
13. *Sale of perishable goods for future delivery; inspection by purchaser.* On a sale of a car-load of oranges, to be shipped from California to the purchaser at Birmingham, Alabama, "subject to inspection, and to be received if found by him to be sound and bright, and if otherwise to be rejected;" the seller is not required to provide in the bill of lading that the purchaser has the right of inspection on the arrival of the car, nor can the purchaser refuse to receive the oranges because the railroad agent refused to let him inspect them without further orders, provided he was allowed to inspect them within a reasonable time after their delivery, to be determined by the jury on a consideration of all the facts and circumstances of the case. *Hudson v. Germain Fruit Co.*, 621.
14. *Bond construed as contract of suretyship, not as guaranty.*—A bond signed jointly by several persons, one of whom had been appointed an agent and collector of a private corporation, by written contract made a part of the bond, reciting that for value received, and in consideration of said contract, they "hereby guarantee to" said corporation "the full and faithful performance of said contract, including all damages which may result to said company from any failure on the part of said S. [collector] to perform any of the provisions of said contract, to the amount of \$1,000; hereby waiving any necessity on the part of said company of instituting legal proceedings against said S. before having recourse on us,"—binds the other obligors as sureties for said S., and not as guarantors. *Saint v. Wheeler & Wilson Man. Co.*, 382.
15. *When contract of suretyship becomes binding, and how revoked.* Such contract of suretyship, unlike a guaranty, does not require notice of acceptance, but becomes complete and binding on delivery; and having been delivered, one of the obligors can not afterwards revoke it as to himself, unless the right of revocation is expressly reserved in the writing. *Ib.* 382.
16. *Release of one of several co-obligors.*—The release of one of several co-obligors operates to release the others only to the extent of his aliquot share of the whole liability. *Ib.* 382.

CORPORATIONS.

1. *Municipal charter; ordinance prohibiting sale of liquor.*—A municipality, situated in a county in which a local prohibitory liquor law is of force, and authorized by its charter "to pass all laws and ordinances, and to provide for enforcing the same, for the

CORPORATIONS—CONTINUED.

- suppression in said town of all offenders known and classed in the laws of the State of Alabama as offenses against the person, . . . offenses against public morality and decency," &c., may by ordinance prohibit the sale of spirituous liquors within its corporate limits. *Ex parte Russellville*, 19.
2. *Sume; imprisonment "until fine and costs are paid."*—A provision in a municipal charter authorizing the corporate authorities, on non-payment of the fine and costs on conviction for the violation of an ordinance, to impose hard labor or imprisonment "until the fine and costs are paid," is violative of the constitutional provision which prohibits imprisonment for debt. *Id.* 19.
 3. *Right of city to erect wharves at river landing.*—A city, or incorporated town, situated on a navigable river, can not, *it seems*, engage in the business of wharfing, erecting wharves, providing keepers thereof, and charging the public for their use in going or carrying property to and from the river, unless that power is conferred by special legislative act; but, when one of its streets, as laid off and dedicated to the public by the original proprietors of the land, extends along the margin of the river through its limits, the city necessarily has the implied right to construct suitable and convenient approaches to the water-line, and to make structures or excavations even beyond the water-line, such as are reasonably necessary and proper to enable the public to avail themselves of the rights of commerce and transportation afforded by the river but having regard to the superior rights of navigation. *Webb v. Demopolis*, 116.
 4. *Private use of public street, as affected by statute of limitations, lapse of time, equitable estoppel, or prescription.*—A city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or *laches* in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to maintain a suit in equity to remove the obstruction. *Id.* 116.
 5. *Plea of of nullity corporation.*—Under statutory provisions (Sess. Acts 1888-9, p. 57), a plea denying plaintiff's corporate existence must be verified by affidavit. *Rosenberg v. Claflin Co.*, 249.
 6. *Foreign corporations doing business here; constitutional and statutory restrictions.*—The constitutional and statutory restrictions imposed on foreign corporations doing business in Alabama do not apply to every act done by such corporations here, but do apply to a loan of money here by a foreign corporation engaged in the business of lending money on mortgage, and prevent a recovery by the corporation on a note given for the money borrowed, when a failure to comply with those provisions is shown. *Dundee Mortgage Co. v. Nixon*, 318.
 7. *Railroad corporation under charter granted by two or more States.* The Memphis & Charleston Railroad Company, incorporated by legislative acts in Alabama, Tennessee and Mississippi, though under the same name, owned by the same stockholders, invested with like franchises, and operated under the same management, is composed of three separate legal entities; and the averment that it "is a unit as a corporation" is the mere statement of a legal conclusion, unsupported by the facts. *Kahl v. M. & C. Railroad Co.*, 337.
 8. *Action against corporation in Alabama, for tort committed in Mississippi.*—An action can not be maintained against a railroad corporation in Alabama, for a tort committed in Mississippi,

CORPORATIONS—CONTINUED.

unless the tort was actionable at common law, or is shown to be actionable by statute in Mississippi. *Ib.* 337.

9. *Transactions between corporations acting through same persons as directors.*—The directors of a private corporation, in the transaction of its business, are the agents of the corporation and its stockholders, and they can not bind it by a contract in reference to a matter in which they have an adverse personal interest; and in transactions between two corporations which have adverse interests, if the same persons act as directors for each of them, either corporation may avoid the contract, without regard to the question of advantage or detriment; but the contract is only voidable at their instance, and creditors can not assail it except on the ground of fraud, though the dual relation of the directors is a circumstance to be considered in determining the good faith of the parties.—*O'Conner M. & M. Co. v. Coosa Furnace Co.*, 614.
10. *Construction of branch road by railroad corporation.*—A grant of corporate power to build and operate a railroad between specified *termini* carries with it the right to construct turn-outs, sidings, switches, stations and engine-houses, and all works and appendages usual in the convenient operation of a railroad; but the right to purchase, extend or construct a "branch road" on or from any point on its line is limited and governed by statutory provisions (Code, §§ 1587-8), and such purchase, extension or construction can only be made by a resolution of the board of directors, ratified and approved by a subsequent vote of the majority in value of the stockholders.—*Arrington v. S. & W. Railroad Co.*, 434.
11. *Breach of contract by corporation; averments of complaint.*—In an action against a railroad company by a contractor for the construction of a branch road, alleging the execution of the contract and its breach by the defendant, it is not necessary further to allege that the construction of the branch road was authorized by resolution of the board of directors, ratified and approved by a vote of a majority of the stockholders in value; that being merely defensive matter, and the presumption being that such preliminary action was had before the work of construction was entered on. *Ib.* 434.

COSTS.

1. *Security for costs; waiver.*—A motion to require plaintiff to give security for costs, because a non-resident (Code, § 2858), will be presumed on appeal to have been waived or abandoned, when the record does not show that it was acted on, or even that it was called to the attention of the court. *Rosenberg v. Clafin Co.*, 249.
2. *Costs of bill of exceptions.*—The bill of exceptions in this case purporting to set out substantially all the evidence, though no charge was given or asked as to the effect of the evidence, and being held unnecessarily long, the cost of copying it was equally divided between the parties, though the judgment was reversed and the cause remanded. *M. & B. Railroad Co. v. Worthington*, 549.

CRIMINAL LAW.

1. *Homicide; words of insult or provocation.*—Mere words of provocation, however insulting or offensive, but not accompanied with an assault, or acts evidencing an intention to resort to im-

CRIMINAL LAW—CONTINUED.

- mediate use of force, can never reduce a homicide from murder to manslaughter; but they may, under some circumstances, reduce the killing to murder in the second degree. *Ex parte Sloane*, 22.
2. *Right to bail*.—A person who is in custody under a charge of murder, is entitled to bail as a matter of right, unless the proof is evident, or the presumption great, that he is guilty of murder in the first degree. *Ib.* 22.
 3. *Same; revision on appeal*.—On application for bail by a person who is in custody under a charge of murder, it is a safe rule to refuse bail when the judge would sustain a capital conviction by a jury on the same evidence, and to admit to bail where the evidence is of less efficacy; and if bail is refused, a revisory court should refuse to interfere, unless it is clear that the lower court erred in its judgment. *Ib.* 22.
 4. *Admissibility of confessions*.—On a prosecution for murder, confessions voluntarily made by the defendant, a negro boy about sixteen or seventeen years old, to the sheriff who had him in custody, and who had told him, in response to an inquiry, "if it would be best for him to tell the truth about," that "it was always best for him or any one else to tell the truth about anything," are admissible as evidence against him. *Mauill v. State*, 1.
 5. *Dying declarations*.—Statements made by the deceased after he received the fatal shot are not admissible evidence as dying declarations, unless it is shown that he was at the time "impressed with the belief that death was impending and would certainly ensue;" and this does not appear when the evidence only shows, as in this case, (1) that the physician who was summoned immediately told him he could not recover, (2) that he lived two days, and (3) that he declared to another witness he "would get even with defendant when he got up." *Young v. State*, 4.
 6. *Charge ignoring fault in bringing on difficulty*.—A charge requested on a trial for murder, which claims an acquittal on certain facts hypothetically stated, but ignores other evidence tending to show that the defendant was not without fault in bringing on the difficulty, is properly refused. *Ib.* 4.
 7. *Reasonable doubt*, to justify an acquittal in a criminal case, implies more than "if it is possible, or it may be, or perhaps the defendant is not guilty;" and a charge asked, which uses those terms as the equivalent of reasonable doubt, is properly refused. *Ib.* 4.
 8. *Charge as to reasonable doubt and probability of innocence*.—A charge asked in a criminal case, instructing the jury that "a reasonable doubt of the defendant's guilt is not the same as a probability of his innocence, but may exist when the evidence fails to convince the jury that there is a probability of defendant's innocence," asserts a correct legal proposition, is not ambiguous, argumentative or misleading, and its refusal is reversible error. *Croft v. State*, 3.
 9. *Election by prosecution*.—On a prosecution for wantonly killing or injuring a bull, the first witness examined having testified that he saw the defendant shoot the bull on a Friday morning, at a place named, may be asked if he had ever seen any other injury inflicted on the bull by the defendant at any other time; and having then testified that, on the next Monday, in a different field, he saw the defendant again shoot it; the prosecution is not limited to the first shooting, but may elect to proceed for the second. *Jackson v. State*, 17.

CRIMINAL LAW—CONTINUED.

10. *Embezzlement by bank officer.*—Under statutory provisions (Code, § 3796), a bank officer may be convicted of embezzling, or fraudulently converting to his own use, money belonging to the bank, or deposited therein, although his possession and control was not exclusive of the other officers; it is immaterial whether his acts were perpetrated secretly or openly, with or without the assent and concurrence of the other officers; if consummated under the guise of a fraudulent loan, made with the assent of the other officers, and regularly credited on the books as an ordinary business transaction, this would not eliminate the criminality of the act; and the fraudulent intent may be inferred by the jury from the misappropriation of the funds. *Reeves v. State*, 31.
11. *Same; indictment.*—An indictment against the president or other officer of a bank incorporated under the laws of this State, in the form prescribed by the Code Form No. 39; Code, p. 270), charging that he, being such officer, "embezzled, or fraudulently converted to his own use, money to about the amount of \$558, which was in the possession of said bank, or deposited therein," is sufficient to authorize a conviction for the embezzlement or fraudulent conversion of money belonging to the bank itself, or deposited therein on general or special account; and though the money was a special deposit, it is not necessary to aver the name of the owner. *Ib.* 31.
12. *Same; evidence.*—In a criminal prosecution against a bank officer for embezzlement, as in other cases involving the question of fraud or fraudulent intent, great latitude is allowed in the range of the evidence, and it is permissible to prove other acts and transactions of similar character, at or about the same time, on the part of the defendant and the other officers, amounting to a misappropriation of the funds of the bank, though entered on its books as loans to each of them, culminating in its failure and assignment at the end of the year; also, that the defendant and his brother, president and vice-president, owned nearly all the stock of the bank, drew out of it during the year, as loans, amounts equal to their stock, and were insolvent when the bank failed; also, that their respective wives each owned a valuable estate, including a plantation which the brothers cultivated jointly during the year, and for which advances were drawn from the bank as loans about equal to its full value. All of this evidence, though relating to acts which might constitute several criminal offenses, is within the legitimate range of the inquiry, tending to show "a long course of unlawful dealing in the affairs and management of the bank, of which defendant could not have been ignorant, and which could not have occurred without his participation, and may shed light on the motives and intent influencing him in the admitted appropriation to his own use of the money drawn out by him on his several checks, including the one on which the indictment is based." *Ib.* 31.
13. *Same.*—The fact that the defendant's brother, who was the vice-president of the bank, kept a private box of papers in the bank, and secretly removed it without the defendant's knowledge, the night before the bank made an assignment, is not relevant or admissible as evidence for any purpose, and its admission is error. *Ib.* 31.
14. *Jurisdiction of justice outside of precinct, or beat.*—Except when sitting as a committing magistrate on a preliminary investigation of a criminal charge, and other cases specially authorized

CRIMINAL LAW—CONTINUED.

- by statute, a justice of the peace has no jurisdiction to hear and determine a criminal case outside of his own beat or precinct (Code, §§ 4233, 4274, 4279--5), though he may "issue process to any precinct in his county, returnable to his own court in his own precinct, and may, perhaps, while outside of his precinct, issue process anywhere within the county, returnable to his own court in his own precinct." (*Limiting Boynton v. State*, 77 Ala. 29.) *Ex parte Davis*, 9.
15. *Same; conclusiveness of judgment; defects available on habeas corpus.*—When a judgment rendered by a justice of the peace in a criminal case is regular on its face, and he had jurisdiction both of the offense and of the defendant's person, its validity can not be assailed on application for a discharge under *habeas corpus*, by parol evidence of the fact that it was rendered by the justice outside of his own precinct, and entered on his docket on his subsequent return home. *Ib.* 9.
 16. *Confession of judgment for fine and costs.*—On a confession of judgment by a surety for the defendant in a criminal case (Code, § 3832), he is bound only for the fine and costs; and if it shows on its face that the defendant's contract also binds him to perform service for advances made to him during the term, it is void entirely. *Ib.* 9.
 17. *Imprisonment "until fine and costs are paid."*—A provision in a municipal charter authorizing the corporate authorities, on non-payment of the fine and costs on conviction for the violation of an ordinance, to impose hard labor or imprisonment "until the fine and costs are paid," is violative of the constitutional provision which prohibits imprisonment for debt. *Ex parte Russellville*, 19.
 18. *Municipal charter; ordinance prohibiting sale of liquor.*—A municipality, situated in a county in which a local prohibitory liquor law is of force, and authorized by its charter "to pass all laws and ordinances, and to provide for enforcing the same, for the suppression in said town of all offenders known and classed in the laws of the State of Alabama as offenses against the person, . . . offenses against public morality and decency," &c., may by ordinance prohibit the sale of spirituous liquors within its corporate limits. *Ib.* 19.
 19. *Sufficiency of indictment; violation of local prohibitory law.*—Under an indictment charging, in the words of the general statute, that the defendant "sold spirituous, vinous or malt liquors without a license, and contrary to law" (Code, § 4037), a conviction may be had on proof of a sale of intoxicating bitters in violation of a local prohibitory law. *Compton v State*, 25.
 20. *What are "intoxicating bitters, mixture, decoction or compound."*—Under a local law prohibiting the sale of any "intoxicating liquors, or any intoxicating decoction, mixture, compound, or bitters," a conviction may be had on proof that the defendant sold a preparation called "Strengthening Cordial," or "Ginger Tonic," which contained alcohol in sufficient quantity to produce intoxication, and which was used by purchasers as a beverage, producing intoxication; and the fact that the articles were prepared and sold by the defendant in good faith as medicines, in ignorance of their intoxicating qualities, or honestly believing that they were not intoxicating, is no defense. *Ib.* 25.
 21. *Shooting across public road.*—A public road can only be established by order of the Commissioners Court, or acquired by the public by dedication or prescription; and a road which, turning out

CRIMINAL LAW—CONTINUED.

from the main road at a point where a temporary obstruction is sometimes caused by a sand-bed, runs parallel with it for a few hundred yards, and returns into it beyond the sand-bed, does not constitute a "public road" under the statute which makes it a misdemeanor to shoot along or across a public road. Code, § 4095. *McDade v. State*, 28.

22. *Refusal of new trial*.—The overruling of a motion for a new trial in a criminal case is not revisable, though an appeal is given by statute in a civil case. *Reeves v. State*, 31.

CUSTOM.

1. *Custom or usage*.—When a local custom or usage, relating to the subject-matter of a contract, is proved to be general throughout the county in which the contract was made, and in which the parties resided, they are presumed to have had knowledge of it, and to have contracted with reference to it, if it does not contradict an express term of the contract. *Redwine v. Sides*, 587.
2. *Custom in New York as to character of building or risk*.—A custom existing in New York city, among persons engaged in the insurance business, by which a block of stores under the same management, all filled with the same kind of goods, is regarded as three separate buildings or risks, because separated by two partition walls, with the openings through them fastened by iron doors, which are kept fastened except when opened for the passage of persons or goods, is not binding on an Alabama insurance company, under its compact of re-insurance for a New York company, unless it is chargeable with notice, actual or constructive, of the existence of such custom; and an implication or presumption of notice does not arise from the generality of the custom in New York city, when it is shown that the New York company took risks in several other cities and States, all of which were equally covered by the re-insurance compact. *G. A. Insurance Co. v. Com. F. Insurance Co.*, 469.

DAMAGES.

1. *Damages for delay in completion of work*.—In an action on a contract for the building of a house, or the performance of other work, the defendant can not claim damages for delay in the completion of the work, when the evidence shows that, by consent, changes were made in the plans and specifications after the commencement of the work, which required a longer time for its completion. *Davis v. Budders & Britt*, 348.
2. *Attorney's fees as damages*.—In an action on an attachment bond, attorney's fees for defending the attachment suit may be recovered as damages, if specially claimed; but an assignment claiming "special damages in the sum of one hundred dollars, in that by said attachment he was put to the expense of employing counsel to defend said attachment suit," is scarcely sufficient without a statement of some amount paid or incurred. *Crofford v. Vassar*, 548.
3. *Actual and exemplary damages*.—In an action on an attachment bond, actual damages may be recovered under a complaint which negatives the existence of any statutory grounds for suing out the writ; but, to authorize a recovery of exemplary or vindictive damages, the existence of probable cause must also be negatived. *Ib* 548.
4. *Relevancy of evidence as to actual damages and malice*.—Damages to the cotton levied on, by being allowed to remain too long in

DAMAGES—CONTINUED.

the field after the levy, may be proved and recovered as a part, of the actual damages; and if exemplary damages are claimed, plaintiff may prove, as tending to show malice, the declaration of his landlord after some difficulty between them, several months before the writ was sued out, "that he intended to get everything that plaintiff made on the plantation that year for nothing." *Ib.* 548.

5. *Proof of relationship and dependency, as affecting measure of damages*—In a statutory action against the employer, by the personal representative of a deceased employe (Code, § 2580), it is not error to exclude proof of the fact that the deceased left a wife and minor child dependent on him, unless followed by an offer to prove his expenditures on their account. When such additional evidence is adduced, the measure of recovery is declared in *L. & N. Railroad Co. v. Trummell*, 98 Ala. 350, and *McAdory v. L. & N. Railroad Co.*, 94 Ala. 272. *Bromley v. B. Mineral Railroad Co.*, 397.

DEDICATION.

1. *Dedication of street in prospective city or town.*—*Held*, as matter of fact, on consideration of the evidence in this case, that the original proprietors, under grant from the United States, of the land on which the town of Demopolis was laid off in 1819, dedicated to the public use as a highway the strip of land lying on the margin of the river, marked on the first map or plat of the town as Arch street, intending to afford to the purchasers of lots and citizens of the embryo town the advantages of free and uninterrupted access to the river, a highway of commerce. *Held*, also, as matter of law, that lots having been sold abutting on the street, and the map having been adopted as showing the limits of the town by the legislative act incorporating it, this dedication became accepted and perfect; and the validity of the dedication was not affected by the fact that said street, in its condition at that time, following the bends of the river, was in several places not susceptible of use as a highway, but required the expenditure of labor and money to make it passable. *Webb v. Demopolis*, 116.
2. *Railroad company's right of way; nature of title.*—Land acquired by a railroad company for its right-of-way, whether by condemnation proceedings or by purchase or grant from the owner, is its private property, though charged with a public use; and the public can not claim any interest in it, as in lands dedicated to the public use. *Elyton Land Co. v. S. & N. Ala. Railroad Co.*, 631.

DEEDS.

1. *Execution of deed or mortgage; signature by mark.*—A mortgage, or other conveyance, to which the grantor's name is signed by mark, duly witnessed by a third person who signs his own as a witness, is legally and efficiently executed, although the grantor's name, he not being able to write, was written by the grantee himself. *Johnson & Co. v. Davis*, 293.
2. *Defective acknowledgment of deed as attestation.*—A defective certificate of acknowledgment, appended to a deed, may operate as the attestation of a witness; the officer who made it may testify to his own signature, and to the fact that the deed was executed in his presence; and the deed is admissible as evidence on that proof. *Jones v. Hagler*, 520.

DEEDS—CONTINUED.

3. *Secondary evidence of recorded deed.*—When a party claims remotely under a deed of which he is not the legal custodian, and which has never been in his possession or custody, he is excused from producing it on notice, and may adduce secondary evidence of its contents; and this may be done by producing either the original record book in which it was recorded, or a certified copy of the record. *Ib.* 529.
4. *Recitals of deed as to date of sale.*—It is not necessary that the trustee's deed to the purchaser at his sale should specify the day on which it was made, but it may state the sale was made "on or about" a named day. *Ib.* 529.
5. *Description or identification of trustee as grantor in deed.*—It is not necessary that the name of the trustee shall be stated in the deed as the grantor, when its recitals and his signature to it clearly identify him as the grantor. *Ib.* 529.
6. *Delay in execution of deed to purchaser.*—When the purchaser sues to recover the possession of the land, and the trustee's deed to him shows that it was executed twelve years after the sale, it is not incumbent on him to explain the delay in its execution, as against the defendant who was not a party to the sale, and who does not show any right to impeach it for fraud. *Ib.* 529.
7. *Failure to record deed; intervening levy of attachment.*—The failure to file a conveyance for record until the twentieth day after its date and execution does not affect its validity as against an attachment levied during the interval, especially where the attaching creditor had actual notice of the deed. *Buford, Mc-Lester & Co. v. Shannon*, 205.
8. *Parol evidence as to consideration of deed.*—When a conveyance of land recites as its consideration the payment of money in hand, and its validity is assailed by creditors of the grantor, parol evidence is admissible to show that the actual consideration was the payment and satisfaction of an antecedent debt. *Ib.* 205.
9. *Conveyance of lands adversely held.*—A conveyance of lands adversely held is void as against the adverse possessor and those claiming under him; but this principle does not apply to a purchaser at a judicial sale, even though he is the plaintiff in the judgment or process. *Sibley v. Alba*, 191.
10. *Exclusion of deed as evidence, or record thereof; presumption in favor of judgment.*—When a deed is offered in evidence, or the record thereof, and is excluded, but the ground of objection is not stated, and the paper itself is not set out in the bill of exceptions, this court will presume that it was properly excluded. *Dunton v. Keel*, 159.
11. *Alienation of homestead; subsequent certificate of acknowledgment.* A conveyance of the homestead, signed by husband and wife, but without the statutory certificate of acknowledgment by the wife (Code, § 250), is a nullity; and the officer before whom it was acknowledged has no power, at a subsequent time, to alter or add to his certificate, or to make a new certificate, without a re-acknowledgment. *Hodges v. Winston*, 514.
12. *Conveyance of homestead by husband to wife.*—A conveyance of the homestead by the husband to the wife, delivered to and accepted by her, is not an alienation of the homestead within constitutional and statutory provisions (Code, § 2508), and does not destroy or affect its character as a homestead, but is effectual to convey to the wife the legal title to the land, on which she may successfully defend an ejectment suit brought by a subsequent purchaser at execution sale against the husband. *Turner v. Bernheimer*, 241.

DETINUE.

1. *When action lies by wife against husband.*—Under the statutory provisions now of force (Code, §§ 2341-51), the wife may maintain an action against the husband for the recovery of personal property which she acquired by gift from him prior to the passage of those statutes. *Bruce v. Bruce*, 563.
2. *When action lies, as between boarder and landlord.*—An action of detinue lies only against a person who is in the possession of the property at the commencement of the suit; and when it appears that the plaintiff, having married the defendant's daughter, went with his wife to board with her father's family, carrying with them numerous articles of household furniture, some of which were used by him and his wife exclusively, while the rest was placed by them in different parts of the house, and used by the family indiscriminately; and further, that on a separation between him and his wife, he quit the house, leaving his wife there with the furniture, in use as before; *held*, (1) that the defendant did not have such possession as would support an action of detinue against him; (2) that if his possession would support the action against him, he might defend on the claim of ownership by the plaintiff's wife. *Behr v. Gerson*, 438.
3. *Outstanding title, as against prior possession of plaintiff.*—In detinue, or the corresponding statutory action for the recovery of personal property in specie (Code, §§ 2717-20), the plaintiff may recover on proof of prior possession, unless the defendant shows a better outstanding title, and connects himself with it. *Ib.* 438.
4. *Affidavit to plea of outstanding title, and notice to claimant.*—A defendant in detinue, or the corresponding statutory action, not claiming title in himself, may set up an outstanding title in a third person, with which he connects himself, without making affidavit and praying that such person be brought in to defend his claim (Code, § 2611); the statute being intended for his benefit, and his failure to avail himself of it only leaving the relative rights and liabilities of himself and the adverse claimant unaffected by it. *Ib.* 438.

DIVORCE.

1. *Proof of adultery, as ground of divorce.*—To authorize a divorce on the ground of adultery, the circumstances proved "must be such as would lead the guarded discretion of a just and reasonable man to the conclusion that the act has been committed;" and applying this rule to the evidence in this case, which the court states, it is held sufficient to establish the charge of adultery on the part of the wife, notwithstanding the direct denials of herself and her alleged paramour. *Morrison v. Morrison*, 309.
2. *Abandonment of wife, as ground of divorce.*—If a husband drives his wife from his house, refusing to let her return for two years or more, she is entitled to a divorce on the ground of abandonment (Code, § 2322), although his act was provoked by exhibitions of ill-temper on her part, the use of coarse and indelicate language, grossly offensive behavior, or other misconduct not constituting a ground of divorce in his favor. *Jones v. Jones*, 443.
3. *Alimony to wife; aggravating conduct on her part.*—When a divorce is granted to the wife on the ground of abandonment, she is entitled to an allowance for alimony although her own misconduct caused her husband to put her away; but, in making the allowance, "regard being had to all the circumstances of the case" (Code, § 2333), the court will reduce it on account of such misconduct on her part. *Ib.* 443.

DIVORCE—CONTINUED.

4. *Legislative act granting divorce; constitutionality of*—Under constitutional provisions now of force, unlike those formerly existing, there is no express limitation of the power of the General Assembly to grant a divorce by legislative act; but the provision which declares that "no *special* or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by a general law, or where the relief sought can be given by any court of this State" (Art. iv, § 23), applies to proceedings for divorce, which are regulated by the general statutes, and renders void any legislative act granting a divorce to a particular person, whether on any of the grounds specified in the statutes, or any other ground whatever. *Jones v. Jones*, 443.

DOWER.

1. *Assignment of dower in equity*.—When dower can not be assigned by metes and bounds, a court of equity has exclusive jurisdiction to make an assignment. *Tygh v. Dolan*, 269.

EJECTMENT.

1. *Proof of title under mortgage*.—When the defendant in ejectment claims under a conveyance from a mortgagee of the plaintiff, but fails to produce his deed, or otherwise connect himself with the mortgagee's title, he can not complain of the exclusion of the mortgage as evidence. *Dunton v. Kerl*, 159.
2. *Proof of identity of lands sued for; general charge on evidence*.—When the lands sued for are described in the complaint only by their government numbers and subdivisions, and, the plaintiff producing no paper title, his witnesses testify to his prior possession of "the upper place" and "the lower place," not identifying them as the lands sued for, the court is not authorized to give the general charge in his favor, although no objection was made by the defendant to the relevancy or sufficiency of the evidence. *Ib.* 159.
3. *Judgment and execution as evidence*.—Where the plaintiff claims as purchaser at a sale made by a trustee under a power conferred by deed of trust for the indemnity of sureties on specified debts, the record of a judgment recovered on one of these debts, and executions thereon showing its payment by one of the sureties, are admissible evidence as tending to show the authority of the trustee to make the sale. *Jones v. Hagler*, 529.

ERROR AND APPEAL.

1. *When appeal lies*.—When a homestead exemption has been allotted to a decedent's widow, and a petition is afterwards filed to set it aside, an appeal does not lie from an order of the court dismissing the petition *ex mero motu*, the record not showing that any one appeared, or was notified to appear and contest it. *Williams v. Hurper*, 610.
2. *Same*.—An appeal is given by statute from an order dissolving an injunction in vacation (Code, § 3613), but the statute does not include an order discharging an injunction; and there being no other adequate remedy, a *mandamus* will be awarded by this court to vacate such order. *Ex parte Sayre*, 289.
3. *What is revisable*.—Leave to file a replication to a plea in abatement, after the expiration of the time allowed by the rules of practice, rests in the discretion of the court, and its refusal is not revisable. *Donald Bros. v. Nelson & Sons*, 111.
4. *Trial by court without jury; revision of judgment on appeal*.—On

ERROR AND APPEAL—CONTINUED.

appeal from a judgment rendered by the City Court of Anniston, in a case which was submitted to the decision of the court without a jury, this court is required to review the finding of the lower court "without any presumption in favor of the court below on the evidence" (Sess. Acts 1888-9, p. 569, § 12); which means, not that when the record furnishes this court with the *data* for reaching a satisfactory conclusion as to the facts in dispute, the circumstance that a different conclusion was reached by the lower court is not to be permitted to affect the decision on appeal, but that this court is to consider the case as if the evidence set out in the record had been presented to the lower court in just the same way, giving no weight whatever to the fact that the lower court had the witnesses before it, and could observe their manner, demeanor &c.; yet, on a second trial after a reversal, the evidence being the same as before, it may become the duty of the lower court to render the same decision as before, at the risk of a second reversal. *Nelson v. Larmer*, 300.

5. *New trial; revision of order granting or refusing.*—Under the statute giving an appeal to this court from an order granting or refusing a new trial (Sess. Acts 1890-91, p. 779), two rules have been declared, to which the court adheres: (1) when the appeal is from an order refusing to grant a new trial on account of the insufficiency of the evidence, or because the verdict is contrary to the evidence, this court will not disturb the decision, unless, after allowing all reasonable presumptions in favor of its correctness, the preponderance of the evidence against the verdict is so decided as to convince the court that it is wrong and unjust; and (2) when the appeal is from an order granting a new trial, the decision will not be reversed unless the evidence plainly and palpably supports the verdict. *White v. Blair*, 147.
6. *Cross errors neutralizing each other.*—There possibly may be conditions in which this court would hold that an error prejudicial to the appellant was neutralized by another error in his favor, and on that account refuse to reverse; but, to justify such ruling, it must affirmatively and clearly appear that no injury was done; and this does not appear when the record does not satisfactorily show that all the meritorious questions in the case were presented and decided in the court below. *Kearney v. Kling*, 230.
7. *Error without injury in rulings on pleadings.*—The sustaining of a demurrer to the original complaint, if erroneous, is error without injury, when the record shows that the plaintiff had the full benefit of the same issues under the amended complaint. *Bromley v. B. Mineral Railroad Co.*, 397.
8. *Error without injury in ruling on pleas.*—Sustaining a demurrer to a plea, if erroneous, is error without injury, when the defendant had the benefit of the same defense under another plea, on which issue was joined. *Rosenberg v. Claffin Co.*, 249; *Sims v. Herzfeld*, 145; *Agnew v. Walden & Son*, 108.
9. *Recalling jury; error without injury.*—The defendant can not complain of any error or irregularity on the part of the court below in recalling the jury and giving them additional instructions, when the record shows that the court might have instructed the jury, without hypothesis, to find for the plaintiff. *Cowen v. Easterly Hardware Co.*, 324.
10. *Issue contesting claim of exemption; error without injury.*—On a contest of a claim of exemption to personalty, an issue being formed

ERROR AND APPEAL—CONTINUED.

- under the direction of the court, in which the plaintiffs allege that the property levied on is subject to their attachment, and is not by law exempted to the defendant, this properly presents the question to be tried, namely, whether the defendant has property, money or effects not included in his inventory; and if there is error in the refusal of the court to require the defendant to join in other special issues tendered by plaintiffs, it is error without injury. *Trager, Canman & Co. v. Fibleman*, 80.
11. *Presumption in favor of judgment*.—When the bill of exceptions purports to set out "substantially all the evidence," but nevertheless shows that some documents were introduced which are not set out, this court will presume that they justified the affirmative charge given by the court below. *Moore, Marsh & Co. v. Penn & Co.*, 200.
 12. *Same*.—When a demurrer is sustained to a plea, but the grounds of demurrer, if any were specified, are not shown by the record, the ruling will be affirmed, if the plea is demurrable for any cause. *Smith v. Dick*, 311.
 13. *Same*.—When a demurrer to a plea is overruled, and the record does not show what grounds of demurrer, if any, were specified (Code, § 2890), this court will presume that none were specified, or that those specified were insufficient; and will not consider the sufficiency of the plea. *Dundee Mortgage Co. v. Nixon*, 318.
 14. *Same*.—When a case is submitted to the decision of the court without a jury, and the bill of exceptions does not purport to set out all the evidence which was adduced, the appellate court will presume, if necessary, that the judgment was justified by other evidence which is not set out. *Hood v. Pioneer M. & M Co.*, 461.
 15. *Presumption in favor of ruling of primary court refusing charge asked*.—When the bill of exceptions does not purport to set out all the evidence, the appellate court will presume that there was evidence which justified the refusal of a charge asked, if any state of proof would have justified its refusal. *Davis v. Badders & Britt*, 848.
 16. *Presumptions as to pleas*.—When no pleas are set out in the record, but it shows that a trial was had on issue joined, and that special defenses were considered by the court below without objection, the appellate court will presume, in favor of the judgment, that proper pleas were filed to let in those defenses; but when the only plea set out in the record is the general issue, the appellate court will not presume, in favor of a reversal, that special pleas were also filed; nor will such presumption be indulged because the bill of exceptions shows that plaintiff introduced evidence bearing on such defenses, in rebuttal of defendant's evidence in support of them, nor because he asked charges based on them. *K. M. & B. Railroad Co. v. Crocker*, 412.

ESTATES OF DECEDENTS.

1. *Petition by administrator for sale of lands; averment of ownership*.—In a petition by an administrator for an order to sell lands for equitable division, an averment that "the lands belonging to the estate of said decedent are the following," is a sufficient averment of ownership to support the jurisdiction of the court to grant an order of sale. *Jones v. Woodstock Iron Co.*, 551.
2. *Conclusiveness of order of sale*.—If the administrator's petition, though demurrable, contains the necessary jurisdictional averments, its defects are not available on collateral attack of the sale, the order of sale being conclusive. *Ib.* 551.

ESTATES OF DECEDENTS—CONTINUED.

3. *What lands may be sold.*—The statute authorizes the sale of an equitable interest in lands, as where the decedent had paid the purchase-money, or a part of it, but had not received a conveyance; but, if the administrator pays the balance of the unpaid purchase-money, and takes a conveyance to the heirs, he can not afterwards have the lands sold under the statutory jurisdiction of the court. *Ib.* 551.
4. *Conclusiveness of confirmed sale.*—When a sale of lands has been made under a proper decree, reported to the court and confirmed, the purchase-money reported paid, and a conveyance ordered and made to the purchaser, its validity can not be assailed by the heirs on the ground that the purchase-money was not in fact paid, or that the sale was not made as directed. *Ib.* 551.
5. *Estoppel against adult heirs.*—If the adult heirs, parties to the proceedings, allow the sale to be confirmed without objection, and the administrator to charge himself, on final settlement, with the purchase-money, decrees being rendered against him in their favor for their respective portions, they are estopped from afterwards assailing the validity of the sale; but the estoppel does not extend to infants, although represented by a guardian *ad litem*, if they have done nothing after attaining their majority to ratify the sale. *Ib.* 551.
6. *Amendment of decree nunc pro tunc.*—If the order of sale refers to the petition as asking a sale for equitable division among the heirs, and to the depositions in support of it as proving that a sale is necessary for the payment of debts, this is a mere clerical misprision, which is amendable by the record; and the amendment may be made at a subsequent term, *nunc pro tunc*, without notice to the heirs. *Ib.* 551.
7. *Filing claims against decedent's estate in equity, under order of court; revivor of claim; mandamus.*—When the administration of a decedent's estate has been removed into equity, under bill filed by the administrator, and that court has made an order requiring creditors to file their claims within a specified time; if a creditor's claim is filed, proved, reported valid by the register under a reference, and his report confirmed without objection; and the creditor then moves to set aside the order requiring claims to be filed, but dies before his motion is acted on, and before formal decree has been entered allowing his claim, his personal representative, or the succeeding administrator *de bonis non* of the estate which he represented, may intervene by motion or petition, for the purpose of prosecuting the claim and the pending motion to a final determination; and if his motion or petition is overruled and refused, this court will award a *mandamus* to compel its allowance. *Keynolds v. Crook*, 570.
8. *Non-claim; description of claim on filing.*—To avoid the statute of non-claim, when pleaded to an action on a promissory note (Code, § 2083), it is not necessary to show that the note itself, or a copy of it, was filed in the office of the probate judge, when it appears that the claim as filed was sufficiently described by name, amount, date, &c.; and being so described, the sufficiency of the filing is not affected by the fact that it is called a *note*, when it is under seal; nor by the fact that it was described as payable on the day of its date, when it is in fact payable one day after date; nor by its withdrawal from the file of claims, and the failure to return it. *Agnew v. Walden & Son*, 108.

ESTATES OF DECEDENTS—CONTINUED.

9. *Same; waiver of exemptions in note, and abandonment thereof.*—When a note, or statement thereof, is filed as a claim against the estate of the deceased maker, whether it is necessary to state the fact that it contains a waiver of exemptions, is not decided; the description of the claim being otherwise sufficient, and a simple judgment for money rendered, which amounts to an abandonment of the waiver. *Ib.* 108.

ESTOPPEL.

1. *Estoppel by word or conduct.*—The breach of a mere executory promise or undertaking does not constitute an estoppel *en pars*, no element of fraud intervening, even though the party complaining, having acted on the faith of the promise, is injured by the breach. *Clanton v. Scruggs*, 279.
2. *Repugnant defenses.*—When the defendant, claiming under a conveyance from a judgment-debtor, has successfully excluded evidence assailing the conveyance for fraud, on the ground that the property conveyed was the homestead of the debtor, he is precluded from afterwards contending that it was not in fact the debtor's homestead. *Hodges v. Winston*, 514.
3. *Estoppel against wife.*—If the husband, on a voluntary separation between him and his wife, allows her to take some of his cattle, intending it as a settlement of her claim to some of them, this does not estop her from afterwards claiming others which belonged to her, unless she consented to so take them. *Bruce v. B ucr*, 463.
4. *Estoppel against pleading statute of limitations.*—A brother being indebted to his imbecile sister by promissory note under seal, and, on her request to renew the contract before it was barred, replying that "it would never run out of date;" *h'ld.*, that this would not estop his widow and children from pleading the statute of limitations in defense of a suit to enforce payment of the debt, although the sister forbore to sue in reliance on it; because, as a promise not to plead the statute, it is itself barred by the statute, and, as an assertion, it is a mistake of law. *Cameron v. Cameron*, 344.
5. *Estoppel against adult heirs.*—If the adult heirs, parties to the proceedings, allow the sale to be confirmed without objection, and the administrator to charge himself, on final settlement, with the purchase-money, decrees being rendered against him in their favor for their respective portions, they are estopped from afterwards assailing the validity of the sale; but the estoppel does not extend to infants, although represented by a guardian *ad litem*. if they have done nothing after attaining their majority to ratify the sale. *Jones v. Woodstock Iron Co.*, 551.
6. *Private use of public street, as affected by statute of limitations, lapse of time, equitable estoppel, or prescription.*—A city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or *laches* in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to main a suit in equity to remove the obstruction. *Webb v. Demopolis*, 116.
7. *Estoppel by chancery decree, and by deed.*—In 1871, the Elyton Land Company, owning the lands on which the prospective

ESTOPPEL—CONTINUED.

city of Birmingham was located, subject to the right-of-way which the Alabama & Chattanooga Railroad Company had secured through them, and desiring to induce other companies to make their roads center there, entered into a contract with said A. & C. company and the South & North Alabama Railroad Company, whose road, as located, would run through or near said city; by which contract, said E. L. Company bargained, sold and conveyed to said two railroad companies a strip of land several hundred feet wide, and extending over 4,000 feet along each side of the right-of-way of said A. & C. road, for railroad purposes, on condition that they erect their depots, machine-shops, &c., in Birmingham, and that they give, grant and convey "to the first two railroad corporations constructing their roads from their terminus to said city" a part of said land, not exceeding one-fourth each, for the construction of their depots, &c.; and on the further condition that a certain portion of said tract, of designated size, "be appropriated and used forever as a general passenger depot for all railroads entering said city, with right-of-way to same; and with the further condition that a strip of the land, 35 feet wide, lying on each side of the right-of-way of the A. & C. company, 'shall be held by the said party of the first part [E. L. Co.] forever as a perpetual right-of-way for all railroad companies doing business in and through said city.'" On the 30th April, 1872, the Elyton Land Company conveyed to the S. & N. Ala. Railroad Company, a strip of land for a right-of-way, but with a proviso, "that any other railroads running into or through the city of Birmingham shall have the right to run a parallel track along and upon the same right-of-way." In March, 1881, the Elyton Land Company filed its bill in equity against the S. & N. Ala. Railroad Company and the Ala. Great Southern Railroad Company, the latter being the successor of the A. & C. Railroad Company; alleging that the S. & N. Ala. company had partially, if not substantially, accepted the terms and conditions of said agreement of April, 1871, by the construction of its road, the erection of buildings, &c., and that the other railroad companies had failed to comply, and had thereby forfeited all rights under said agreement of April, 1871, which, as the complainant insisted, was revocable on that account; and therefore praying that all rights granted by said agreement to the other railroad companies be divested, but reserving the rights thereby granted to the S. & N. Ala. Railroad Company. Decrees *pro confesso* being duly entered against the two defendant corporations, a decree was rendered in accordance with the prayer of the bill, revoking, annulling and declaring void the said agreement of April, 1871, as to the A. & C. company, the A. G. S. company, and all other railroad companies except the S. & N. Ala. company, whose rights were reserved and confirmed. Afterwards, the E. L. Company conveyed to the S. & N. Ala. R. R. Co., for railroad purposes, a part of said strip of lands in severalty, in satisfaction of the covenants of said agreement of April, 1871. *Held*, that the Elyton Land Company was estopped, as against the S. & N. Ala. Railroad Company, from insisting that the strip of land so conveyed to it was to be held as a right-of-way for all other railroad companies as well as for itself. *Elyton Land Co. v. S. & N. Railroad Co.*, 632.

EVIDENCE.

ADMISSIBILITY AND RELEVANCY.

1. *Embezzlement by bank officer.*—In a criminal prosecution against a bank officer for embezzlement, as in other cases involving the question of fraud or fraudulent intent, great latitude is allowed in the range of the evidence, and it is permissible to prove other acts and transactions of similar character, at or about the same time, on the part of the defendant and the other officers, amounting to a misappropriation of the funds of the bank, though entered on its books as loans to each of them, culminating in its failure and assignment at the end of the year; also, that the defendant and his brother, president and vice-president, owned nearly all the stock of the bank, drew out of it during the year, as loans, amounts equal to their stock, and were insolvent when the bank failed; also, that their respective wives each owned a valuable estate, including a plantation which the brothers cultivated jointly during the year, and for which advances were drawn from the bank as loans about equal to its full value. All of this evidence, though relating to acts which might constitute several criminal offenses, is within the legitimate range of the inquiry, tending to show "a long course of unlawful dealing in the affairs and management of the bank, of which defendant could not have been ignorant, and which could not have occurred without his participation, and may shed light on the motives and intent influencing him in the admitted appropriation to his own use of the money drawn out by him on his several checks, including the one on which the indictment is based." *Keever v. State*, 31.
2. *Same.*—The fact that the defendant's brother, who was the vice-president of the bank, kept a private box of papers in the bank, and secretly removed it without the defendant's knowledge, the night before the bank made an assignment, is not relevant or admissible as evidence for any purpose, and its admission is error. *Ib.* 31.
3. *Evidence as to value of lands assessed for taxation.*—In fixing the taxable value of land, the owner's return to the assessor being controverted, it may be proper, perhaps, to receive evidence of the value of other lands in the neighborhood similarly situated, as being a feature of its surroundings; but the valuation of those lands as found upon the tax-books, whether made by the owner, the tax-assessor, or the Commissioners Court, is not admissible as evidence for any purpose. *Ala. Mineral Land Co. v. County Commissioners*, 105.
4. *Attachment as evidence of indebtedness.*—On the trial of a statutory claim suit, the plaintiff's attachment is sufficient evidence of the defendant's indebtedness to them when it was sued out, and the claimant can not question it. *Moore, Marsh & Co. v. Penn & Co.*, 200.
5. *Evidence as to speed of moving car; what witness may state.*—Where the injuries complained of are alleged to have been caused by the negligence of the foreman of a car on which plaintiff was working, by suddenly checking it while moving at a rapid rate of speed, whereby plaintiff was thrown off, run over and injured; the rate of speed of the car being relevant and material to the issue, and plaintiff having testified that it was moving at the rate of eight or ten miles an hour, he may be asked, "About how fast, compared to a man running?" and may answer, "It was running faster than a man could run." *K. M. & B. Railroad Co. v. Crocker*, 412.

EVIDENCE—CONTINUED.

6. *Relevancy of evidence as to cause of stoppage of car.*—Plaintiff's injuries having been caused by the sudden stoppage of the hand-car on which he was an employe, the foreman applying the brake without notice, and there being no evidence that an extra train was heard or seen approaching, the defendant company can not be allowed to prove that, by a rule of the company, it was made the duty of the person in charge of the hand-car at once to stop and remove it from the track when a train was seen or heard approaching. *Ib.* 412.
7. *Relevancy of evidence as to sales by other agents.*—When plaintiff sues for commissions on sales of machinery made or effected by him as agent for defendants, they can not be allowed to prove they had other agents in the county who were authorized to make sales for them. *DeLoach Mills Man. Co. v. Middlebrooks*, 459.
8. *Undue influence; relevancy of evidence as tending to show.*—As tending to prove undue influence over the testatrix by one of her sons, one of the executors and proponents, who was his mother's general agent in the transaction of her business, the contestant can not be allowed to prove that, on a sale of land by her, the son signed her name to the bond for title. *Eastis v. Montgomery*, 486.
9. *Evidence as to pecuniary condition of children not provided for by will.*—It being shown on the part of the contestant that affectionate relations existed between the testatrix and certain grandchildren, for whom the will made no provision, the proponents may prove that these children had considerable property of their own. *Ib.* 486.
10. *Relevancy of evidence as to mental condition of testatrix.*—When the probate of a will is contested on the ground of mental incapacity or undue influence, the real issue is as to the condition of the mind, or the operation and effect of the undue influence, at the time the will was executed; but former facts and circumstances, relevant to this issue, are admissible as evidence for either party. *Knox v. Knox*, 495.
11. *Judgment and execution as evidence.*—Where the plaintiff claims as purchaser at a sale made by a trustee under a power conferred by deed of trust for the indemnity of sureties on specified debts, the record of a judgment recovered on one of these debts, and executions thereon showing its payment by one of the sureties, are admissible evidence as tending to show the authority of the trustee to make the sale. *Jones v. Hagler*, 529.
12. *Relevancy of evidence as to actual damages and malice.*—Damages to the cotton levied on, by being allowed to remain too long in the field after the levy, may be proved and recovered as a part of the actual damages; and if exemplary damages are claimed, plaintiff may prove, as tending to show malice, the declaration of his landlord after some difficulty between them, several months before the writ was sued out, "that he intended to get everything that plaintiff made on the plantation that year for nothing." *Crofford v. Vassar*, 548.
13. *Giving bond as part of contract; evidence as to.*—When a material issue is whether plaintiff performed work for the defendant railroad company as an original contractor or as a sub-contractor under another person, the defendant may prove the fact that he gave no bond for the faithful performance of the work, bonds being required of contractors, and of them only. *M. & B. Railroad Co. v. Worthington*, 598.

EVIDENCE—CONTINUED.

14. *Relevancy of evidence as to contract vel non.*—The question at issue being whether plaintiff, in performing work on railroad trestles, was an original contractor with the railroad company or a sub-contractor under one P., the defendant company may prove the fact that, during the performance of the work, he received instructions and directions from P. without objection. *Ib.* 598.
 15. *Publication for bids as evidence of contract vel non.*—Where plaintiff sues for the breach of an alleged contract with a railroad company for the construction of trestles, and the defendant denies that any contract was ever consummated between them, the publication for bids for the doing of the work, signed by the chief engineer, is admissible as evidence for either party: for the plaintiff, as showing that the approval of the contract by the president of the company was not required; and for the defendant, as showing that security was required for the prompt and faithful performance of the work, which plaintiff had never given. *Ib.* 598.
- ADMISSIONS; CONFESSIONS; DECLARATIONS; HEARSAY; RES GESTÆ.
16. *Admission as to facts in issue.*—In an action on an account, an admission by the parties that, if defendant is entitled to a certain credit claimed by him, then he is entitled to recover, and if not then plaintiffs are entitled to recover, dispenses with the necessity of any proof of the account, and leaves only the question of the sufficiency of the evidence to establish the credit claimed. *Cowen v. Eartherly Hardware Co.*, 324.
 17. *Admissibility of confessions.*—On a prosecution for murder, confessions voluntarily made by the defendant, a negro boy about sixteen or seventeen years old, to the sheriff who had him in custody, and who had told him, in response to an inquiry, "if it would be best for him to tell the truth about it," that "it was always best for him or any one else to tell the truth about anything," are admissible as evidence against him. *Maull v. State*, 1.
 18. *Dying declarations.*—Statements made by the deceased after he received the fatal shot are not admissible evidence as dying declarations, unless it is shown that he was at the time "impressed with the belief that death was impending and would certainly ensue;" and this does not appear when the evidence only shows, as in this case, (1) that the physician who was summoned immediately told him he could not recover, (2) that he lived two days, and (3) that he declared to another witness he "would get even with defendant when he got up." *Young v. State*, 4.
 19. *Dying declarations* are not admissible as evidence in a civil action for damages against the employer, by the administrator of a deceased employe. *Hood v. Pioneer M. & M. Co.*, 461.
 20. *Declarations of partner, as hearsay.*—A partner can not testify to a loan of money, or other partnership transaction, when he knows nothing about the matter except as informed by the other partners. *Moore, Marsh & Co. v. Penn & Co.*, 200
 21. *Declarations as evidence; general objection to evidence partly admissible.*—Although the declarations of the grantor in a conveyance, the validity of which is attacked by creditors, as to the compensation he was paying the grantee for his services as clerk, are mere hearsay, and therefore inadmissible as evidence, where a third person testifies as to them; yet, when the witness also testifies to the compensation agreed on between

EVIDENCE—CONTINUED.

- them, and objection is made to his entire testimony, it may be overruled entirely, since a part of the evidence is legal. *Buford, McLester & Co. v. Shannon*, 205.
22. *Declarations of devisee and proponent as evidence.*—The declarations of an executor and proponent, one of several beneficiaries under the will propounded for probate, not made in the presence of the testatrix, are not competent evidence for the contestant, whether made before or after the execution of the will. *East v. Montgomery*, 486.
23. *Letter or declarations of third person as evidence.*—Plaintiff claiming damages of a railroad company for not letting him do work which he had contracted to do, and in other particulars connected with the work done, and the defense being that he was only a sub-contractor under another person, with whom the company had settled in full; a letter written by that person to him, saying, "They paid it without regard to you, ignoring you except as a sub-contractor, and it leaves your claim for changing work and giving you more expensive work to do as it stood before," is not admissible as evidence for plaintiff, though it might be admissible against him. *M. & B. Railroad Co. v. Worthington*, 598.
24. *Declarations as part of res gestæ.*—A witness testifying as to a settlement made by him with the officers of a railroad company, for work done by him under contract, in which work plaintiff claimed to be also interested as a contractor, may state what he told the railroad officials as to his contract with plaintiff, and as to the extent of his authority to represent plaintiff in the settlement; such declarations being part of the *res gestæ*, and admissible as original testimony. *Ib.* 598.
- BURDEN; WEIGHT; SUFFICIENCY.
25. *Plea of statute of frauds; burden of proof.*—When issue is joined on a plea of the statute of frauds, in an action on a contract within its terms (Code, § 1732), the plaintiff assumes the *onus* of proving a compliance with its terms, or that the contract was taken out of the statute by part performance. *Jones v. Hagler*, 529.
26. *Burden of proof; possession as evidence of ownership.*—On the trial of a statutory claim suit, the *onus* is on the plaintiff in execution, in the first instance, to prove the defendant's ownership of the property at the time of the levy; but this burden being discharged by proof of his possession at that time, which is presumptive evidence of ownership, the *onus* then devolves on the claimant to establish his ownership at that time. *Taught v. Oehmig & Wiehl*, 306.
27. *Burden of proof as to payment, in action on note.*—In an action on a promissory note, the only plea being payment, the production of the note makes out a *prima facie* case for the plaintiff; and the evidence as to payment being evenly balanced, he is entitled to a verdict. *Nelson v. Larmer*, 300.
28. *As to validity of deed, and payment of consideration.*—When a conveyance of property by an insolvent debtor to one of his creditors, in payment of an existing debt, is assailed by other creditors as fraudulent, the *onus* is on the grantee to establish the existence, *bona fides*, and amount of his debt, showing no material discrepancy between it and the reasonable value of the property; but, if the jury are satisfied from the evidence that the amount of the debt as claimed was due and allowed on a

EVIDENCE—CONTINUED.

- settlement between the parties, it is not necessary that each of the items involved should also be separately proved to their satisfaction; and a charge requested, instructing them that they must find against the deed, unless each item of the indebtedness claimed is proved to their satisfaction, is properly refused. *Bujard, McLester & Co. v. Shannon*, 205.
29. *Transactions between parties occupying fiduciary relations towards each other.*—When transactions between parties occupying fiduciary relations towards each other are assailed in equity, the *onus* is on the party in whom the confidence is reposed to show that no fraud, undue influence, or other improper motive entered into the transaction, but that it was the voluntary act of the other party, fully understood by him, and his understanding of it fully expressed in the writings which he signed. *Kyle v. l'erdue*, 579.
30. *Burden of proof in case of will; participation of proponent in preparation of will.*—Where it is shown that the chief executor and proponent of the will was the general agent of the testatrix, his mother, in the transaction of her business, the fact that he carried her to town with him, on her own request, and procured an attorney named by her to write her will, does not show such active participation on his part in the procurement of the will as, coupled with the existence of the confidential relations between them, will cast on him the *onus* of disproving undue influence. *Eastis v. Montgomery*, 486.
31. *Charge as to explanation of "suspicious circumstance."*—A charge requested on the contested probate of a will, instructing the jury that, if the proponents and principal beneficiaries under its provisions had a "controlling agency in procuring its execution, it is universally regarded as a very suspicious circumstance, and requiring the fullest explanation," requires too high a degree of proof, and is properly refused. *Knox v. Knox*, 495

EXPERTS; OPINION; To what Witness may Testify.

82. *To what witness may testify.*—The chief engineer of a railroad company, testifying as to work done by plaintiff on railroad trestles, whether as original railroad contractor or as sub-contractor under one P. being the question at issue, may use these expressions: "This contract was given to him by P. at my special instance, and because of my previous negotiations with him; the amount of work done by him for P. on the trestles is the identical amount of work he would have done for the company if the company had contracted directly with him instead of P., as he did all the framing that was done on the trestles." Also, "At all events, the entire claim is erroneous, . . . and, from an engineering stand-point, is preposterous." *M. & B. Railroad Co. v. Worthington*, 598.
33. *Evidence as to speed of moving car; what witness may state.*—Where the injuries complained of are alleged to have been caused by the negligence of the foreman of a car on which plaintiff was working, by suddenly checking it while moving at a rapid rate of speed, whereby plaintiff was thrown off, run over and injured; the rate of speed of the car being relevant and material to the issue, and plaintiff having testified that it was moving at the rate of eight or ten miles an hour, he may be asked, "About how fast, compared to a man running?" and may answer, "It was running faster than a man could run." *K. M. & B. Railroad Co. v. Crocker*, 412.

EVIDENCE—CONTINUED.

34. *To what witness may testify, as to performance and discharge without fault.*—Plaintiff, testifying for himself, in an action to recover damages for a breach of contract of employment, can not be allowed to state that defendant "discharged him without fault on his part," nor that he "performed his part of the contract in full up to the time of his discharge;" and the questions calling for such statements are illegal because leading. *Clark v. Ryan*, 406.

OBJECTIONS.

35. *Objection to "each sentence" of letter.*—When objection is made and overruled to the admission of a letter as evidence, and objection is then made "to each sentence of said letter separately," the latter objection is but a repetition of the general objection to the whole letter. *M. & B. Railroad Co. v. Worthington*, 598.
36. *Objection to evidence partly legal.*—A general objection to evidence, part of which is legal, may be overruled entirely. *Buford, Mc-Lester & Co. v. Shannon*, 205.
37. *Same.*—When evidence is offered as a whole, part of it being illegal, the whole may be excluded on objection. *Clark v. Ryan*, 406.

PAROL AND WRITTEN.

38. *Parol evidence as to consideration of deed.*—When a conveyance of land recites as its consideration the payment of money in hand, and its validity is assailed by creditors of the grantor, parol evidence is admissible to show that the actual consideration was the payment and satisfaction of an antecedent debt. *Buford, McLester & Co. v. Shannon*, 205.
39. *Parol evidence affecting judgment of justice of the peace.*—When a judgment rendered by a justice of the peace, in a criminal case, is regular on its face, and he had jurisdiction both of the offense and of the defendant's person, its validity can not be assailed on application for a discharge under *habeas corpus*, by parol evidence of the fact that it was rendered by the justice outside of his own precinct, and entered on his docket on his subsequent return home. *Ex parte Davis*, 9.

PRIMARY AND SECONDARY.—

40. *Secondary evidence of recorded deed.*—When a party claims remotely under a deed of which he is not the legal custodian, and which has never been in his possession or custody, he is excused from producing it on notice, and may adduce secondary evidence of its contents; and this may be done by producing either the original record book in which it was recorded, or a certified copy of the record. *Jones v. Hagler*, 529.

VARIANCE.

41. *Variance in description of injuries complained of.*—Where the complaint alleges that the plaintiff's intestate was killed in the discharge of his duties as brakeman, "while ascending the side of the car," by coming in contact with a water-tank which had been placed too near the railroad track, and the evidence shows that, when struck by the tank, he was standing on the platform between two cars, with his back towards the tank, the variance is fatal. *Hood v. Pioneer M. & M. Co.*, 481.
42. *Recklessness, or willful or intentional wrong.*—Under a complaint which alleges that plaintiff's injuries were inflicted wantonly, willfully and intentionally, a recovery can not be had on proof

EVIDENCE—CONTINUED.

of simple negligence merely, nor is contributory negligence a defense to the action; but a count which charges that the injury was caused "negligently, carelessly, and recklessly," is not the equivalent of a charge that it was done wantonly, willfully or intentionally. *K. M. & B. Railroad Co. v. Crocker*, 412.

EXECUTORS AND ADMINISTRATORS.

1. *When administrator may maintain trover.*—The intestate having died in August, leaving a crop of cotton in the field ungathered and still growing, which was afterwards gathered and sold by one of his sons, the bales being marked in the name of the intestate; an administrator subsequently appointed may maintain trover against the purchaser, who, when he bought the cotton, knew that the intestate was dead, and that no administration had been granted on his estate. *Marx v. Nelms*, 304.
2. *When administrator may maintain action of forcible entry and detainer.*—An administrator, whose right and title relate back to the intestate's death, may maintain an action of forcible entry and detainer, or unlawful detainer (Code, §§ 3380–81), against a person who, with his wife, was living on the premises with the intestate at the time of his death, "as his friends, by his invitation and request, and without any claim or right of possession," and who, being left in possession by the administrator under appointment as special administrator only, "on the understanding and their agreement to hold the same as his tenants until further orders," afterwards attorned to another person as landlord; and he may also maintain the action against such third person, and against any tenant placed by him in possession after the removal of the attorning tenant. *Espalla v Gottschalk*, 254.
3. *Non-claim; description of claim on filing.*—To avoid the statute of non-claim, when pleaded to an action on a promissory note (Code, § 2083), it is not necessary to show that the note itself, or a copy of it, was filed in the office of the probate judge, when it appears that the claim as filed was sufficiently described by name, amount, date, &c.; and being so described, the sufficiency of the filing is not affected by the fact it is called a *note*, when it is under seal: nor by the fact that it is described as payable on the day of its date, when it is in fact payable one day after date; nor by its withdrawal from the file of claims, and the failure to return it. *Agnew v. Walden & Son*, 108.
4. *Same; waiver of exemptions in note, and abandonment thereof.*—When a note, or statement thereof, is filed as a claim against the estate of the deceased maker, whether it is necessary to state the fact that it contains a waiver of exemptions is not decided; the description of the claim being otherwise sufficient, and a simple judgment for money rendered, which amounts to an abandonment of the waiver. *Ib.* 108.
5. *Filing claims against decedent's estate in equity, under order of court; revivor of claim; mandamus.*—When the administration of a decedent's estate has been removed into equity, under bill filed by the administrator, and that court has made an order requiring creditors to file their claims within a specified time; if a creditor's claim is filed, proved, reported valid by the register under a reference, and his report confirmed without objection: and the creditor then moves to set aside the order requiring claims to be filed, but dies before his motion is acted on, and before formal decree has been entered allowing his claim, his personal

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- representative, or the succeeding administrator *de bonis non* of the estate which he represented, may intervene by motion or petition, for the purpose of prosecuting the claim and the pending motion to a final determination; and if his motion or petition is overruled and refused, this court will award a *mandamus* to compel its allowance. *Reynolds v. Crook*, 570.
6. *Revivor of judgment against decedent.*—Under statutory provisions, a judgment recovered against the decedent in his life-time can not be revived or enforced against his administrator except by suit (Code, § 2880); but when the judgment has been filed as a claim against the decedent's estate, under an order of court made in a pending chancery suit, and the creditor dies before its final determination, the right of revivor is secured to his personal representative by other statutory provisions (§§ 2285, 2608), and the former statute does not apply. *Ib.* 570.
 7. *Petition by administrator for sale of lands; averment of ownership.* In a petition by an administrator for an order to sell lands for equitable division, an averment that "the lands belonging to the estate of said decedent are the following," is a sufficient averment of ownership to support the jurisdiction of the court to grant an order of sale. *Jones v. Woodstock Iron Co.*, 551.
 8. *Conclusiveness of order of sale.*—If the administrator's petition, though demurrable, contains the necessary jurisdictional averments, its defects are not available on collateral attack of the sale, the order of sale being conclusive. *Ib.* 551.
 9. *What lands may be sold.*—The statute authorizes the sale of an equitable interest in lands, as where the decedent had paid the purchase-money, or a part of it, but had not received a conveyance; but, if the administrator pays the balance of the unpaid purchase-money, and takes a conveyance to the heirs, he can not afterwards have the lands sold under the statutory jurisdiction of the court. *Ib.* 551.
 10. *Conclusiveness of confirmed sale.*—When a sale of lands has been made under a proper decree, reported to the court and confirmed, the purchase-money reported paid, and a conveyance ordered and made to the purchaser, its validity can not be assailed by the heirs on the ground that the purchase-money was not in fact paid, or that the sale was not made as directed. *Ib.* 551.

EXEMPTIONS.

1. *Homestead in tracts of land not contiguous*—Two tracts of land, containing respectively forty and fifty acres, and of value less than \$2,000, may constitute an exempt homestead, if occupied and cultivated together, and used as a common source of family support, though a half mile or more apart. *Hodges v. Winston*, 514.
2. *Conveyance of homestead; validity as against creditors.*—Creditors can not complain of a conveyance of his homestead by their debtor, since they are not thereby injured. *Ib.* 514.
3. *Alienation of homestead; subsequent certificate of acknowledgment.* A conveyance of the homestead, signed by husband and wife, but without the statutory certificate of acknowledgment by the wife (Code, § 250), is a nullity; and the officer before whom it was acknowledged has no power, at a subsequent time, to alter or add to his certificate, or to make a new certificate, without a re-acknowledgment. *Ib.* 514.
4. *Conveyance of homestead by husband to wife.*—A conveyance of the homestead by the husband to the wife, delivered to and ac-

EXEMPTIONS—CONTINUED.

cepted by her, is not an *alienation* of the homestead within constitutional and statutory provisions (Code, § 2508), and does not destroy or affect its character as a homestead, but is effectual to convey to the wife the legal title to the land, on which she may successfully defend an ejectment suit brought by a subsequent purchaser at execution sale against the husband. *Turner v. Bernheimer*, 241.

5. *House and lot as homestead; how determined.*—Whether or not a house and lot in an incorporated town can constitute an exempt homestead, is to be determined by the character of the building, the uses to which it is adapted, and to which it has been devoted, and not by the intention or purpose of the owner in building it; and where the house, as here, is a building 40 feet by 20, divided by partition into two rooms, the larger one being fitted up with shelves and used as a bar-room, first by the owner and then by his lessee, it can not be claimed as a homestead because the smaller room, about 14 by 16 feet in size, was used by him as a bed-room, while taking his meals elsewhere in town, and was not leased with the residue of the premises, though the lessee was allowed to sleep in it. *Garrett & Sons v. Jones*, 98.
6. *Claim of exemption against garnishment; record of another suit as evidence*—When two garnishment suits are pending against the same defendant and the same garnishee, but in favor of different plaintiffs, the court will not look to the record of one case on the trial of the other, except as it is offered in evidence; and if it appears that the debtor filed a claim of exemption in the second case, and that it was not contested, the plaintiff in that case can not complain that the court ordered the older judgment to be first satisfied, and awarded him only the admitted balance remaining in the hands of the garnishee. *Young v. L. & N. Railroad Co.*, 454.
7. *Claim of exemption by debtor to indebtedness admitted by garnishee under continuing contract.*—When a garnishee admits an indebtedness under a continuing contract of employment, which either party has a right to terminate without notice at the end of any month, and a claim of exemption is thereupon interposed by the debtor, the claim extends only to the indebtedness then existing; and an oral answer being required, if the garnishee then admits a further indebtedness under the contract as modified from time to time, and a new claim of exemption is then interposed, this claim can not retroact on payments made during the intermediate period. *Ensley Furnace Co. v. Rogan & Co.*, 594.
8. *Claim of exemption to property levied on; waiver of accompanying inventory.*—When a claim of exemption is interposed to personal property on which an attachment has been levied, it should be accompanied with a statement of all the defendant's other personal property, *choses in action*, &c. (Code, §§ 2521, 2525); but the want of such statement is waived, if the plaintiff, without objecting to the sufficiency of the claim, makes a written demand for an inventory. *Trager, Canman & Co. v. Fiebleman*, 80.
9. *Issue contesting claim of exemption; error without injury.*—On a contest of a claim of exemption to personalty, an issue being formed under the direction of the court, in which the plaintiffs allege that the property levied on is subject to their attachment, and is not by law exempted to the defendant, this properly presents the question to be tried, namely, whether the defendant has property, money or effects not included in his inventory; and

EXEMPTIONS—CONTINUED.

- if there is error in the refusal of the court to require the defendant to join in other special issues tendered by plaintiffs, it is error without injury. *Ib.* 60.
10. *Evidence on issue as to ownership of money.*—On the trial of an issue contesting a debtor's claim of exemption to property on which an attachment has been levied, plaintiffs having proved that he received a considerable sum of money for goods sold a few days before the levy of the attachment, it is permissible for him to show that, when the written demand for an inventory was made on him, he had already used the money in the payment of other *bona fide* debts. *Ib.* 60.
 11. *Disposition of property by defendant in attachment claiming exemption.* When a defendant in attachment claims as exempt the specific property levied on, and his claim is contested by the attaching creditor, he is not thereby deprived of the right to prefer other *bona fide* creditors, and to pay their debts with any other property; but a gift, or fraudulent disposition of his property, is void as against plaintiffs and other existing creditors. *Ib.* 60.
 12. *Claim of exemption of personalty; subsequent levy, contest, and notice.* When a declaration and claim of exemption to personal property has been duly filed in the proper office, the property specified is not subject to subsequent levy, unless the claim is contested as provided by the statute, or a waiver of exemptions is shown by the process (Code, §§ 2419-20); but the defendant is entitled to notice in writing of the levy, though it is not necessary for the notice to state the fact that the claim is contested. *Bledsoe v. Gary & Kennedy*, 70.
 13. *Same; demand of inventory; judgment by default.*—Demand in writing for an inventory (Code, § 2525) is not the equivalent of notice of the levy and contest; and if the defendant then files an inventory, not being in default, it can not be struck from the files because not filed within the first three days of the term; and being improperly struck from the files, the plaintiff is not entitled to judgment by default, but should tender an issue. *Ib.* 70.
 14. *Same; waiver of notice.*—If the defendant, not having notice of the levy and contest, and not being in default, appears and files an inventory, which is improperly struck from the files, and he then files a plea in bar, this is a waiver of the want of notice, and authorizes a personal judgment against him. *Ib.* 70.
 15. *Waiver of exemptions in note; insurance by debtor for benefit of his wife.*—A waiver of exemptions in a promissory note does not affect the debtor's right to insure his life for the benefit of his wife, paying annual premiums not in excess of \$500 (Code, § 2356); nor can the creditor, having reduced his debt to judgment, reach and subject in equity property which the surviving wife has bought or improved with the proceeds of the policy. *Craft & Co. v. Stoutz*, 245.
 16. *Waiver of exemptions in note, and abandonment thereof.*—When a note, or statement thereof, is filed as a claim against the estate of the deceased maker, whether it is necessary to state the fact that it contains a waiver of exemptions, is not decided; the description of the claim being otherwise sufficient, and a simple judgment for money rendered, which amounts to an abandonment of the waiver. *Agnew v. Walden & Son*, 108.

FINE AND FORFEITURE FUND.

1. *Constitutionality of law changing disposition of, as against registered claims.*—The fund arising from fines and forfeitures in the several counties is the creature of statute, and is subject at all times to legislative control, as to the claims to be paid out of it, their preferences, and other conditions of payment; and the holder of claims, which have been duly registered under existing statutes, does not thereby acquire such a vested right to share in the fund as to exempt the claims from a subsequent statute changing the priority and mode of payment. *Harold v. Herrington*, 396.
2. *Act of Feb. 9th, 1891, regulating fund in Conecuh and Escambia counties.*—The statute approved February 9th, 1891, "to regulate the fine and forfeiture fund of Conecuh and Escambia counties, and the disposal of moneys arising from fines, forfeitures and convict labor in said counties" (Sess. Acts 1890-91, pp. 494-5), which requires that the money belonging to the fund shall be held subject to the order of the County Commissioners, that they shall advertise for bids from the holders of claims, and award the money to the highest bidder, is not violative of any rights acquired by the holders of claims which, by being duly registered under former statutes, had acquired a priority or preference over claims subsequently registered, nor otherwise unconstitutional. *Ib.* 395.

FORCIBLE ENTRY AND DETAINER.

1. *When administrator may maintain action.*—An administrator, whose right and title relate back to the intestate's death, may maintain an action of forcible entry and detainer, or unlawful detainer (Code, §§ 3380-81), against a person who, with his wife, was living on the premises with the intestate at the time of his death, "as his friends, by his invitation and request, and without any claim or right of possession," and who, being left in possession by the administrator under appointment as special administrator only, "on the understanding and their agreement to hold the same as his tenants until further orders," afterwards attorned to another person as landlord; and he may also maintain the action against such third person, and against any tenant placed by him in possession after the removal of the attorning tenant. *Espalla v. Gottschalk*, 254.

FRAUDS, STATUTE OF.

1. *Plea of statute of frauds; burden of proof.*—When issue is joined on a plea of the statute of frauds, in an action on a contract within its terms (Code, § 1732), the plaintiff assumes the *onus* of proving a compliance with its terms, or that the contract was taken out of the statute by part performance. *Jones v. Hagler*, 529.
2. *Part performance avoiding statute of frauds.*—If the purchaser of land, under a verbal contract, is placed in possession, and pays the purchase-money, or a part thereof, the contract is taken out of the statute of frauds (Code, § 1732); but the two facts must concur, and a court of equity can not extend the terms of the statute by dispensing with either. (*Rakes v. Pope*, 7 Ala. 161, limited to sales of personal property.) *Manning v. Pippen*, 537.
3. *Verbal promise to make will, as consideration of deed.*—A verbal promise to make a will devising land to the promisee, in consideration of his present conveyance of the land to the promisor, is void under the statute of frauds (Code, §§ 1732, 1845), and a court of equity will not grant relief based on it. *Ib.* 537.

FRAUDS, STATUTE OF—CONTINUED.

4. *Statute of frauds; when available on demurrer.*—When relief is sought in equity founded on a contract which is obnoxious to the statute of frauds, and that fact appears on the face of the bill, the benefit of the statute as a defense may be invoked by demurrer. *Clanton v. Scruggs*, 279.
5. *Contract for sale of interest in lands; partial performance.*—A verbal promise or undertaking by defendant not to erect or allow the erection of a warehouse at his landing on a navigable river, if complainant would purchase the adjoining land above, erect a warehouse on it, and store his freight free of charge, is void under the statute of frauds (Code, § 1732); and it is not taken out of the operation of the statute on the ground of part performance, because the complainant, on the faith of the promise, bought the land above, erected a warehouse on it, and stored defendant's freight free of charge for several years. *Ib.* 279.

FRAUDULENT CONVEYANCES.

1. *Conveyance by insolvent or embarrassed debtor; when set aside at instance of creditor.*—A conveyance of his property by an insolvent or embarrassed debtor, though executed with the fraudulent intent on his part to put his property beyond the reach of his creditors, will not be set aside in equity at their instance, unless the purchaser participated in the fraudulent purpose, or had knowledge or notice thereof, actual or constructive; and when answer on oath is required of him, and he answers fully and explicitly, denying all knowledge or notice as charged, his denials must prevail, unless the testimony adduced is sufficient to overcome them. *Pattison v. Briggs*, 55.
2. *Sale of goods by insolvent debtor to creditor; validity as against other creditors.*—An embarrassed or insolvent debtor may sell his entire stock of goods in absolute payment of a *bona fide* existing debt, when there is no material difference between the value of the property and the amount of the debt, and no use or benefit is reserved to himself; but, when such sale is attacked by other creditors, the purchaser must satisfactorily prove the existence, amount, and *bona fides* of his debt, and the adequacy of the consideration; and if he proves only a part of his debt, it must be regarded as simulated, at least to the extent of the residue, and renders the sale fraudulent in fact as against other creditors. *Moorr, Marsh & Co. v. Penn. & Co.*, 200.
3. *Conveyance of homestead; validity as against creditors.*—Creditors can not complain of a conveyance of his homestead by their debtor, since they are not thereby injured. *Hodges v. Winston*, 514.
4. *Conveyance by insolvent debtor to creditor; validity as against other creditors.*—A conveyance of land by an insolvent debtor to one of his creditors, in absolute payment of an existing debt, is not rendered invalid as against other creditors by the grantee's knowledge of the grantor's insolvency: but, if it is accompanied with the sale of a stock of goods, at a fair valuation, in payment of the balance of the debt, a small excess of about \$20 being paid by the purchaser in cash, this would invalidate the entire transaction as against other creditors; yet, where the bill of exceptions states that the evidence showed, without controversy, that there was no connection between the two contracts, and that the sale of the land was concluded before any negotiations were had in reference to the purchase of the goods, the implied fraud in the latter contract does not affect the validity of the former. *Buford, McLester & Co. v. Shannon*, 205.

FRAUDULENT CONVEYANCES—CONTINUED.

5. *Same; proof of payment of consideration.*—When a conveyance of property by an insolvent debtor to one of his creditors, in payment of an existing debt, is assailed by other creditors as fraudulent, the *onus* is on the grantee to establish the existence, *bona fide*, and amount of his debt, showing no material discrepancy between it and the reasonable value of the property; but, if the jury are satisfied from the evidence that the amount of the debt as claimed was due and allowed on a settlement between the parties, it is not necessary that each of the items involved should also be separately proved to their satisfaction; and a charge requested, instructing them that they must find against the deed, unless each item of the indebtedness claimed is proved to their satisfaction, is properly refused. *Ib.* 205.
6. *Unrecorded mortgage; validity as against subsequent mortgagees, purchasers, and judgment creditors.*—Under statutory provisions (Code, §§ 1810-11), a mortgage of real estate, given to secure an antecedent debt, is inoperative and void as against subsequent purchasers for value, mortgagees, and judgment-creditors, without notice, unless recorded before the accrual of their respective rights; and the fact that it is filed for record at the same time with a subsequent mortgage, does not give it any preference over the latter. *Steiner Bros. v. Chishy*, 91.
7. *Same; proof of notice.*—When the holder of a prior unrecorded mortgage seeks to foreclose and enforce his lien against subsequent mortgagees, the *onus* is on him to prove that they had notice of it, actual or constructive, before their rights accrued; and if the second mortgage was given to secure three separate and independent debts, due to three different persons, the fact that one of them had knowledge of the prior mortgage does not charge the others with constructive notice of it. *Ib.* 91.
8. *Conveyances by insolvent debtor, as parts of general assignment.*—An insolvent debtor having, under repeated decisions of this court, the right to sell and convey property in absolute payment of an existing debt, provided the price is fair and reasonable, and no use or benefit is reserved to himself, such absolute sale and conveyance will not, at the instance of other creditors, be declared and treated as part of a general assignment executed soon afterwards (Code, § 1737), though executed in anticipation of it, and with notice on the part of the creditor that the debtor intended to make a general assignment. *Ellison v. Moses*, 221.
9. *Same.*—A mortgage executed by an insolvent partnership to one of its members, to secure a debt for money loaned, which was in his hands as receiver in a chancery cause, with instructions to lend it out on mortgage of real estate, and which he allowed the firm to use without security, under the agreement or understanding, express or implied, that they would secure it by mortgage, will be declared and treated as part of a general assignment executed by the firm on the same day. *Ib.* 221.

GARNISHMENT. See ATTACHMENT, 13-22.

GUARANTY. See SURETIES, 1.

HABEAS CORPUS. See CRIMINAL LAW, 2, 3, 15.

HOMESTEAD. See EXEMPTIONS, 1-5.

HUSBAND AND WIFE.

1. *When action lies by wife against husband.*—Under the statutory provisions now of force (Code, §§ 2341-51), the wife may main-

HUSBAND AND WIFE—CONTINUED.

- tain an action against the husband for the recovery of personal property which she acquired by gift from him prior to the passage of those statutes. *Bruce v. Bruce*, 563.
2. *Estoppel against wife*.—If the husband, on a voluntary separation between him and his wife, allows her to take some of his cattle, intending it as a settlement of her claim to some of them, this does not estop her from afterwards claiming others which belonged to her, unless she consented to so take them. *Ib.* 563.
 3. *Proof of wife's ownership of property, as against execution creditor of husband*.—When the wife interposes a statutory claim to property on which an execution against her husband has been levied, and which is shown to have been in his possession at the time of the levy, her ownership is not sufficiently established by the testimony of her husband alone, who fails to disclose, in answer to special interrogatories, how, when or from whom she acquired the money with which to make the alleged purchases from himself and others, and whose testimony is in other particulars suspicious, improbable, and unsatisfactory, the wife herself not testifying. *Vaught v. Oehmig & Wiehl*, 806.
 4. *Conveyance of homestead by husband to wife*.—A conveyance of the homestead by the husband to the wife, delivered to and accepted by her, is not an *alienation* of the homestead within constitutional and statutory provisions (Code, § 2508), and does not destroy or affect its character as a homestead, but is effectual to convey to the wife the legal title to the land, on which she may successfully defend an ejectment suit brought by a subsequent purchaser at execution sale against the husband. *Turner v. Bernheimer*, 241.

INDICTMENT. See CRIMINAL LAW, 11, 19.

INJUNCTION. See CHANCERY, 5-8, 35-37.

INSURANCE.

1. *Ownership of insured property; representations as to, and proof*.—In an application for a policy of insurance on a storehouse, a statement or representation, in answer to one of the printed questions, that the applicant has a "fee-simple title," only means that he owns the absolute beneficial interest, as contradistinguished from a limited, qualified, or conditional interest; and in an action on the policy, he may testify that he bought and owned the property, without producing his deed, or proving payment of the purchase-money. *Capital City Insurance Co. v. Caldwell Bros.*, 77.
2. *Notice and preliminary proof of loss*.—Notice and preliminary proof of the loss having been promptly furnished, and no objection made to them in reply, after which the company's adjuster was sent to the place, who only objected to the valuation of the property as excessive, and insisted that the counters and shelves were not insured as a part of the house, this amounts to a waiver of all objections to the sufficiency of the notice or preliminary proof. *Ib.* 77.
3. *Counters and shelves as part of storehouse*.—Counters and shelves in a storehouse may be insured as part of the house itself, when built or let into the walls or frame thereto, though not expressly mentioned in the application or the policy; and it is for the jury to determine from the evidence whether they are part of the house or not—whether they are movable or immovable fixtures. *Ib.* 77.

INSURANCE—CONTINUED.

4. *Assignment of policy of insurance, or interest in insured property.*
An assignment indorsed on a policy of insurance of furniture, by the husband to his wife, in these words: "The interest of M. B., as owner of the property covered by this policy, is hereby assigned to Bertha B., subject to the consent of the company," transfers to the wife the ownership of the property insured. *Behr v. Gerson*, 489.
5. *Re-insurance compact; whether building or risk is one or several.*—Under a contract or compact of re-insurance, between an Alabama insurance company and a New York company, by which the former agreed to assume a certain portion of the risks taken by the latter, on due notice, and within a limit of \$5,000 on any one building or risk; *held*, that a block of stores in New York city, under the same management, and filled with the same kind of goods, was to be regarded as one building and one risk, although two partition walls divided it into three stores, and each with its contents was covered by a different policy; the evidence also showing that the stores on each floor were connected by openings in the partition walls, through which persons passed and goods were moved, though they were generally closed with iron doors. *G. A. Insurance Co v. Capital City Insurance Co*, 469.
6. *Same; custom in New York as to character of building or risk.*—A custom existing in New York city, among persons engaged in the insurance business, by which a block of stores under the same management, all filled with the same kind of goods, is regarded as three separate buildings or risks, because separated by two partition walls, with the openings through them fastened by iron doors, which are kept fastened except when opened for the passage of persons or goods, is not binding on an Alabama insurance company, under its compact of re-insurance for a New York company, unless it is chargeable with notice, actual or constructive, of the existence of such custom; and an implication or presumption of notice does not arise from the generality of the custom in New York city, when it is shown that the New York company took risks in several other cities and States, all of which were equally covered by the re-insurance compact. *Ib* 469.
7. *Same; ratification of risk outside of compact.*—The re-insuring company, the defendant, can not be charged with acquiescence in a risk outside of the compact, or ratification of it, because it failed to object after notice, unless it was notified of all the facts showing that the risk was outside of the compact; and the *onus* is on the plaintiff company to prove that it gave full notice of the facts, as required by its fiduciary position. *Ib* 469.
8. *Waiver of defense to claim.*—If the defendant company, when first notified of the loss, claimed exemption from liability on a ground depending on the legal construction of the contract, this does not amount to a waiver of a defense afterwards developed by facts not then known, and of which plaintiff ought to have given notice. *Ib* 469.
9. *Waiver of exemptions in note; insurance by debtor for benefit of his wife.*—A waiver of exemptions in a promissory note does not affect the debtor's right to insure his life for the benefit of his wife, paying annual premiums not in excess of \$500 (Code, § 2356); nor can the creditor, having reduced his debt to judgment, reach and subject in equity property which the surviving wife has bought or improved with the proceeds of the policy. *Craft & Co. v. Stoutz*, 245.

JUDGMENTS, AND DECREES.

1. *Plea denying jurisdiction of person, and replication averring subsequent appearance.*—In an action on a foreign judgment, the defendant pleaded that the court which rendered it had no jurisdiction of his person; to which plaintiff replied that, at a subsequent term of the court, defendant appeared, and moved to set aside the judgment on the same ground alleged in his plea, and that the court decided the motion against him; *held*, that the replication was demurrable because it not aver facts which showed that the court had jurisdiction of the motion to set aside the judgment. *Kohn, Leberman & Co. v. Haas*, 478.
2. *Conclusiveness of judgment.*—A judgment is conclusive of all matters which might have been urged as defenses against its rendition, and such matters are not available in defense of an action on it. *Sims v. Herzfeld*, 145.
3. *Same.*—The landlord having obtained a judgment in his attachment suit against his tenant, and being sued in trover by the purchasing creditor, the judgment is conclusive of his right to maintain the action, and can not be assailed by the purchaser on the ground that, before suing out the attachment, he had transferred the notes for rent to a third person as collateral security, and was not the owner of them; but the purchaser may assail the judgment on the ground of fraud, or because it was not founded on a debt for rent, or because the debt was in fact paid. *Aderhold v. Blumenthal & Becker*, 68.
4. *Judgment for more than amount claimed.*—If the complaint contains a substantial cause of action, but judgment is rendered for more than the amount claimed in the complaint, with interest thereon, the irregularity not being objected to in the court below, where it might have been remedied (Code § 2835), it is not available on error. *Smith v. Dick*, 311.
5. *Revivor of judgment against decedent.*—Under statutory provisions, a judgment recovered against the decedent in his life-time can not be revived or enforced against the administrator except by suit (Code, § 2880); but, when the judgment has been filed as a claim against the decedent's estate, under an order of court made in a pending chancery suit, and the creditor dies before its final determination, the right of revivor is secured to his personal representative by other statutory provisions (§§ 2265, 2803), and the former statute does not apply. *Reynolds v. Crook*, 570.
6. *Conclusiveness of decree of foreclosure.*—Payment of the mortgage debt is a complete defense to a suit for foreclosure; but, if the heirs and administrator are made parties to the foreclosure suit, and neither of them interposes that defense, the decree is conclusive evidence that the debt is unpaid, unless the heirs can successfully impeach it on the ground of fraud and collusion between the administrator and the mortgagee or his assignee, who also became the purchaser at the sale under the decree. *Sibley v. Alba*, 191.
7. *Conclusiveness of judgment; defects available on habeas corpus.* When a judgment rendered by a justice of the peace in a criminal case is regular on its face, and he had jurisdiction both of the offense and of the defendant's person, its validity can not be assailed on application for a discharge under *habeas corpus*, by parol evidence of the fact that it was rendered by the justice outside of his own precinct, and entered on his docket on his subsequent return home. *Ex parte Davis*, 9.
8. *Confession of judgment for fine and costs.*—On a confession of judg-

JUDGMENTS, AND DECREES—CONTINUED.

- ment by a surety for the defendant in a criminal case (Code, § 3832), he is bound only for the fine and costs; and if it shows on its face that the defendant's contract also binds him to perform service for advances made to him during the term, it is void entirely. *Ib* 9.
9. *Sale under decree of foreclosure; personal decree for balance of debt.* Under a decree for the foreclosure of a mortgage, if the proceeds of sale of the mortgaged property do not satisfy the decree in full, the mortgagee is entitled to a personal decree for the unpaid balance (Code, § 3805); but, if the decree is satisfied in full, he can not have a personal decree for a balance reported in his favor by the register under the statement of an account between the parties relative to matters outside of the mortgage. *Perdue v Brooks Bros.*, 611.
 10. *Decree for divestiture of title.*—Under a bill which seeks to divest the legal title to land out of the defendants and vest it in the complainant, the court may directly so order, adjudge and decree, without requiring the execution of a deed by the defendant, the register, or a special commissioner. (*Drewitt v. Ashford*, 90 Ala. 264, overruled, except as to proceedings instituted on its authority.) *Jones v. Woodstock Iron Co*, 551.
 11. *Conclusiveness of order of sale.*—If the administrator's petition, though demurrable, contains the necessary jurisdictional averments, its defects are not available on collateral attack of the sale, the order of sale being conclusive. *Ib* 551.
 12. *Conclusiveness of confirmed sale.*—When a sale of lands has been made under a proper decree, reported to the court and confirmed, the purchase-money reported paid, and a conveyance ordered and made to the purchaser, its validity can not be assailed by the heirs on the ground that the purchase-money was not in fact paid, or that the sale was not made as directed. *Ib* 551.
 13. *Amendment of decree nunc pro tunc.*—If the order of sale refers to the petition as asking a sale for equitable division among the heirs, and to the depositions in support of it as proving that a sale is necessary for the payment of debts, this is a mere clerical misprision, which is amendable by the record; and the amendment may be made at a subsequent term, *nunc pro tunc*, without notice to the heirs. *Ib* 551.

JURISDICTION.

1. *Jurisdiction of justice outside of precinct, or beat.*—Except when sitting as a committing magistrate on a preliminary investigation of a criminal charge, and other cases specially authorized by statute, a justice of the peace has no jurisdiction to hear and determine a criminal case outside of his own beat or precinct (Code, §§ 4233, 4274, 4279-5), though he may "issue process to any precinct in his county, returnable to his own court in his own precinct, and may, perhaps, while outside of his precinct, issue process anywhere within the county, returnable to his own court in his own precinct." (Limiting *Boydton v. State*, 77 Ala. 29.) *Ex parte Davis*, 9.
2. *Authority of judge of City Court of Montgomery to grant injunction.* The judge of the City Court of Montgomery has authority, equally with a circuit judge or chancellor, to grant an injunction in a case pending in Colbert county. *Ex parte Sayre*, 288.
3. *Jurisdiction of Federal courts, as affected by amount in controversy, and residence of parties.*—When a bill is filed in the Circuit

JURISDICTION—CONTINUED.

Court of the United States, to compel a settlement and distribution of a decedent's estate, the value of the estate is the amount in controversy, and a decree may be rendered in favor of each distributee for his share, though less than \$500; and if some of the complainants are non-residents, it is immaterial that other distributees are not. *Thornton v. Tison*, 589.

JUSTICE OF THE PEACE.

1. *Sufficiency of statement, or complaint.*—In a case commenced in a justice's court, a statement or complaint, claiming "\$100 for a mule that plaintiff sold to defendant," shows a substantial cause of action, and is sufficiently definite and certain. *Smith v. Dick*, 311.
2. *Jurisdiction of justice outside of precinct, or beat.*—Except when sitting as a committing magistrate on a preliminary investigation of a criminal charge, and other cases specially authorized by statute, a justice of the peace has no jurisdiction to hear and determine a criminal case outside of his own beat or precinct (Code, §§ 4233, 4274, 4279-85), though he may "issue process to any precinct in his county, returnable to his own court in his own precinct, and may, perhaps, while outside of his precinct, issue process anywhere within the county, returnable to his own court in his own precinct." (Limiting *Boynton v. State*, 77 Ala. 29.) *Ex parte Davis*, 9.

LANDLORD AND TENANT.

1. *Landlord's lien on tenant's goods, for rent of storehouse; garnishment against assignee.*—When a tenant has made an assignment for the benefit of his creditors, the landlord may sue out an attachment to enforce his statutory lien on the goods and effects for the rent of the house in which the tenant lived, or carried on his business (Code, §§ 3069-70), and may summon the assignee by process of garnishment; and he is entitled to a judgment of condemnation for goods and effects remaining unsold in the hands of the garnishee, and also a money judgment for the proceeds of goods sold by him; but not for the proceeds of sale of property to which, though used by the tenant in and about his business, the landlord's lien never extended, nor for money collected for goods sold by the tenant, in the regular course of trade, prior to the assignment. *McKleroy v. Cantley & Randolph*, 295.
2. *Same.*—A landlord's statutory lien for rent, on the goods, furniture and effects of his tenant in the rented storehouse (Code, §§ 3069-70), is not displaced or affected by a sale of the goods by the tenant to a creditor who had knowledge or notice of the landlord's lien, or the fact that the goods were in a rented house; and if the purchasing creditor had such knowledge or notice, the ignorance of his agent or attorney who effected the purchase can not avail him. *Aderhold v. Blumenthal & Beckert*, 66.
3. *Same; conclusiveness of judgment; defenses available to purchaser.* The landlord having obtained a judgment in his attachment suit against his tenant, and being sued in trover by the purchasing creditor, the judgment is conclusive of his right to maintain the action, and can not be assailed by the purchaser on the ground that, before suing out the attachment, he had transferred the notes for rent to a third person as collateral security, and was not the owner of them; but the purchaser

LANDLORD AND TENANT—CONTINUED.

may assail the judgment on the ground of fraud, or because it was not founded on a debt for rent, or because the debt was in fact paid. *Ib.* 66.

LIMITATIONS, STATUTE OF.

1. *Estoppel against pleading statute of limitations*.—A brother being indebted to his imbecile sister by promissory note under seal, and, on her request to renew the contract before it was barred, replying that "it would never run out of date;" *held*, that this would not estop his widow and children from pleading the statute of limitations in defense of a suit to enforce payment of the debt, although the sister forbore to sue in reliance on it; because, as a promise not to plead the statute, it is itself barred by the statute, and, as an assertion, it is a mistake of law. *Cameron v. Cameron*, 344.
2. *Partial payments avoiding bar of statute of limitations*.—A partial payment on a debt, made before the statutory bar is complete, prevents the statute from running (Code, § 2628), without regard to the amount paid; but the trifling sums of 25 cents, 50 cents, &c., advanced by a brother to his imbecile sister at intervals of several months, will not be regarded as partial payments on his note for \$600, unless proved to have been made and received as partial payments. *Ib.* 344.
3. *Private use of public street, as affected by statute of limitations, lapse of time, equitable estoppel, or prescription*.—A city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or *laches* in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to maintain a suit in equity to remove the obstruction. *Webb v. Demopolis*, 116.

MANDAMUS.

1. *When writ lies*.—An appeal is given by statute from an order dissolving an injunction in vacation (Code, § 3613), but the statute does not include an order discharging an injunction; and there being no other adequate remedy, a *mandamus* will be awarded by this court to vacate such order. *Ex parte Sayre*, 289.
2. *Same*.—This court will grant a *mandamus* requiring the Chancery Court to allow an administrator *de bonis non* to intervene as a party to a pending suit, for the purpose of prosecuting a claim which the previous administrator had filed under an order of the court, but died before its final determination. *Reynolds v. Crook*, 570.

MINERAL LANDS.

1. *Mineral rights severed from ownership of soil*.—A grant or reservation of the minerals in a tract of land, severed from the ownership of the surface, carries with it the right to penetrate through the surface to the minerals, for the purpose of mining and removing them, by the adoption and use of such machinery, methods, appliances and instrumentalities as are reasonably necessary and ordinarily used in such business; and, it may be, for the deposit or storage of the minerals in their first marketable state, until they can be transported with reasonable diligence. But these incidental rights must be exercised with due regard to the rights of the owner of the soil, without injury to his right

MINERAL LANDS—CONTINUED.

of support for the surface, and without any permanent damage thereto, not necessary to the proper and beneficial enjoyment of the right to mine; they cease when the minerals on the land are exhausted, and do not justify the use of the surface for the deposit, loading and transporting of minerals taken from other adjacent lands. *Hooper v. Dora Coal Mining Co.*, 235.

MORTGAGES.

1. *Tender of mortgage debt after default, but before possession taken, and payment of money into court.*—A tender of full payment of the mortgage debt after default, but before the mortgagee has taken or demanded possession of the property for the purpose of foreclosure, if kept good, and the money brought into court, discharges the lien of the mortgage, and extinguishes the title of the mortgagee; and on proof of these facts, the mortgagor may recover the property from a purchaser at a subsequent sale under the mortgage. *Maxwell v. Moore*, 168.
2. *Unrecorded mortgage; validity as against subsequent mortgagees, purchasers, and judgment-creditors.*—Under statutory provisions (Code, §§ 1810-11), a mortgage of real estate, given to secure an antecedent debt, is inoperative and void as against subsequent purchasers for value, mortgagees, and judgment-creditors, without notice, unless recorded before the accrual of their respective rights; and the fact that it is filed for record at the same time with a subsequent mortgage, does not give it any preference over the latter. *Steiner Bros. v. Clisby*, 91.
3. *Same; proof of notice.*—When the holder of a prior unrecorded mortgage seeks to foreclose and enforce his lien against subsequent mortgagees, the *onus* is on him to prove that they had notice of it, actual or constructive, before their rights accrued; and if the second mortgage was given to secure three separate and independent debts, due to three different persons, the fact that one of them had knowledge of the prior mortgage does not charge the others with constructive notice of it. *Ib.* 91.
4. *Proof of title under mortgage.*—When the defendant in ejectment claims under a conveyance from a mortgagee of the plaintiff, but fails to produce his deed, or otherwise connect himself with the mortgagee's title, he can not complain of the exclusion of the mortgage as evidence. *Dunton v. Keel*, 159.
5. *Payment of mortgage debt; conclusiveness of decree of foreclosure.* Payment of the mortgage debt is a complete defense to a suit for foreclosure; but, if the heirs and administrator are made parties to the foreclosure suit, and neither of them interposes that defense, the decree is conclusive evidence that the debt is unpaid, unless the heirs can successfully impeach it on the ground of fraud and collusion between the administrator and the mortgagee or his assignee, who also became the purchaser at the sale under the decree. *Sibley v. Alb*, 191.
6. *Sale under power in mortgage; purchase by mortgagee.*—A sale of lands under a power in a mortgage, in substantial compliance with its terms, cuts off the equity of redemption as effectually as a decree of foreclosure, leaving nothing in the mortgagor but the statutory right of redemption, and the right to disaffirm the sale if the mortgagee himself became the purchaser at the sale without express authority given by the mortgage; but, if the mortgagor elects to disaffirm the sale on that account, his election must be accompanied with an offer to redeem by paying the amount due. *Mortgage Companies v. Turner*, 272.
7. *Rents accruing after sale under power in mortgage; when purchaser is entitled to receiver.*—The purchaser at a sale under a power in

MORTGAGES—CONTINUED.

a mortgage is entitled to the rents subsequently accruing, even though he be the mortgagee, and was not authorized to purchase; and if the mortgagor and his tenants refuse to attorn to him, are insolvent, and are disposing of the crops, he is entitled to a receiver. *Ib.* 272.

8. *Rents of mortgaged lands after foreclosure; attachment against crops.* When lands subject to a lease are conveyed by mortgage, the mortgagee succeeds to all the rights of the mortgagor as lessor, and the lessee becomes his tenant without attornment (Code, § 1823); but, when the lease is made by the mortgagor after the execution of the mortgage, it is subordinate to the mortgage, and the mortgagee may recover the possession and the rents after the law-day; yet, if the lessee refuses to attorn to him after foreclosure under the power, denying his right to the rents, the mortgagee can not enforce his lien on the crops by attachment (Code, §§ 3056-59-61), being neither the landlord nor his assignee. *Ib.* 272.
9. *Mortgagee's right, after purchase at sale under power, to injunction and receiver in aid of ejectment; appointment of receiver without notice.*—A mortgagee of lands, having become the purchaser at a sale under the power, but without express authority conferred by the mortgage, and having brought ejectment to recover the possession of the land, may come into equity for an injunction to prevent the mortgagor and a person holding under him by fraudulent conveyance from disposing of the crops, and for a receiver to take possession, gather and hold the crops, on averment that the land is not worth the amount of the mortgage debt, that the defendants are insolvent, and that they have removed and disposed of part of the crops; and a receiver may be appointed without notice, complainant being required to execute a proper bond. *Hendrix v. Amer. F. L. Mortgage Co.*, 813.
10. *Action for surplus proceeds of sale of mortgaged property under power.* When land is sold under a power contained in a mortgage, and brings more than the amount of the mortgage debt, with interest and lawful charges, the mortgagor or his assignee may recover the proceeds by action for money had and received. *Tompkins v. Drennen*, 463.
11. *Stipulation in mortgage for payment of attorney's fees, or costs of collecting.*—When a mortgage contains a power of sale, and directs the proceeds to be devoted, first, "to the expense of advertising and selling, and all attorney's or solicitor's fees," while the secured note contains a provision that the mortgagor "shall pay all costs for collecting the above, not less than ten per cent., on failure to pay at maturity;" a sale being made under the power, the mortgagee can retain only a reasonable fee for attorney's services rendered in connection with the sale. *Ib.* 463.
12. *Waiver of mortgage lien construed.*—A letter addressed by a merchant who held a mortgage on two or more tracts of land, on one of which it was a first lien, to a firm of commission-merchants who held another mortgage on the lands, in these words: "If you will advance to G. & Co. [mortgagors] an additional amount of \$2,500, for the purpose of making their arrangements to carry on their mercantile business and to make their crops, so as to make their indebtedness to you, including the above \$2,500, in all \$10,500, I will and do hereby waive my mortgage lien on the land and personal property of said G. & Co., to the extent of said indebtedness and interest, for and on your account only,"—applies not only to the \$2,500 ad-

MORTGAGES—CONTINUED.

- ditional advance, but to the entire indebtedness (\$10,500) and interest. *Bolling v. Roman*, 518.
13. *Sale under decree of foreclosure; personal decree for balance of debt.* Under a decree for the foreclosure of a mortgage, if the proceeds of sale of the mortgaged property do not satisfy the decree in full, the mortgagee is entitled to a personal decree for the unpaid balance (Code, § 3805); but, if the decree is satisfied in full, he can not have a personal decree for a balance reported in his favor by the register under the statement of an account between the parties as to matters outside of the mortgage. *Perdue v. Brooks Bros.*, 611.
 14. *Power of sale in deed of trust; request of beneficiaries, or either of them.*—When a deed of trust is executed for the protection and indemnity of two sureties, and authorizes the trustee to sell and "pay whatever may be necessary to indemnify them or either of them," he may sell at the request of one, who alone has been damnified. *Jones v. Hagler*, 529.
 15. *Possession of trustee making sale under power.*—When a deed of trust authorizes the trustee to take possession and sell on default, but does not require that he shall enter before making a sale, he may sell without taking possession, and it is not necessary that his deed to the purchaser shall show that he was in possession. *Ib.* 529.
 16. *Recitals of deed as to date of sale.*—It is not necessary that the trustee's deed to the purchaser at his sale should specify the day on which it was made, but it may state that the sale was made "on or about" a named day. *Ib.* 529.
 17. *Description or identification of trustee as grantor in deed.*—It is not necessary that the name of the trustee shall be stated in the deed as the grantor, when its recitals and his signature to it clearly identify him as the grantor. *Ib.* 529.
 18. *Sale under power for cash, or on credit.*—When the deed authorizes the trustee to sell for cash, and he sells on time, with the acquiescence of the beneficiary, who receives the benefit of the bid, a third person can not assail the purchaser's title because the sale was not made for cash. *Ib.* 529.
 19. *Delay in execution of deed to purchaser.*—When the purchaser sues to recover the possession of the land, and the trustee's deed to him shows that it was executed twelve years after the sale, it is not incumbent on him to explain the delay in its execution, as against the defendant who was not a party to the sale, and who does not show any right to impeach it for fraud. *Ib.* 529.
 20. *Conveyance to third person as purchaser, at instance of bidder at sale.* A stranger to the sale can not assail its validity because the trustee executed a deed, not to the nominal bidder and purchaser, but to a third person at his instance. *Ib.* 529.
 21. *Mortgage as part of general assignment.*—A mortgage executed by an insolvent partnership to one of its members, to secure a debt for money loaned, which was in his hands as receiver in a chancery cause, with instructions to lend it out on mortgage of real estate, and which he allowed the firm to use without security, under the agreement or understanding, express or implied, that they would secure it by mortgage, will be declared and treated as part of a general assignment executed by the firm on the same day. *Ellison v. Moses*, 91.

NAVIGABLE RIVERS.

1. *Title to land on margin of navigable river, between high-water and low-water mark.*—How far the title of a proprietor of land on the margin of a navigable river extends—whether to high-water mark, low-water mark, or the middle of the stream—is not a Federal question, though he may claim under a grant from the United States, but is to be determined by the laws of the State in which the land is situated, as declared by its statutes and judicial decisions; and the established law in Alabama is, that it extends to low-water mark, ending only where the right to the use of the water as a navigable stream begins. *Webb v. Demopolis*, 116.
2. *Right of city to erect wharves at river landing.*—A city, or incorporated town, situated on a navigable river, can not, *it seems*, engage in the business of wharfing, erecting wharves, providing keepers thereof, and charging the public for their use in going or carrying property to and from the river, unless that power is conferred by special legislative act; but, when one of its streets, as laid off and dedicated to the public by the original proprietors of the land, extends along the margin of the river through its limits, the city necessarily has the implied right to construct suitable and convenient approaches to the water-line, and to make structures or excavations even beyond the water-line, such as are reasonably necessary and proper to enable the public to avail themselves of the rights of commerce and transportation afforded by the river, but having regard to the superior rights of navigation. *Ib.* 116.

NEGLIGENCE.

1. *Injuries to employe by negligence in management of hand-car, or lever-car.*—A lever-car, or car propelled by hand, such as is in general use on railroads by the workmen engaged in repairing and keeping up the track, is within the spirit and terms of the statute (Code, § 2590, subd. 5) which gives an action against the employer for injuries suffered by an employe by reason of the negligence of any person in the service who has charge of "any signal, points, locomotive, engine, switch, car or train upon a railway." *K. M. & B. Railroad Co. v. Crocker*, 412.
2. *Evidence as to speed of moving car; what witness may state.*—Where the injuries complained of are alleged to have been caused by the negligence of the foreman of a car on which plaintiff was working, by suddenly checking it while moving at a rapid rate of speed, whereby plaintiff was thrown off, run over and injured; the rate of speed of the car being relevant and material to the issue, and plaintiff having testified that it was moving at the rate of eight or ten miles an hour, he may be asked, "About how fast, compared to a man running?" and may answer, "It was running faster than a man could run." *Ib.* 412.
3. *Relevancy of evidence as to cause of stoppage of car.*—Plaintiff's injuries having been caused by the sudden stoppage of the hand-car on which he was an employe, the foreman applying the brake without notice, and there being no evidence that an extra train was heard or seen approaching, the defendant company can not be allowed to prove that, by a rule of the company, it was made the duty of the person in charge of the hand-car at once to stop and remove it from the track when a train was seen or heard approaching. *Ib.* 412.
4. *Contributory negligence as defense, and how pleaded.*—In an action to recover damages for personal injuries, contributory negligence on the part of the plaintiff himself is defensive matter in the

NEGLIGENCE—CONTINUED.

- nature of confession and avoidance, must be specially pleaded (Code, § 2875), and is not available under the general issue. (Overruling *Government Street Railway Co. v. Hanlon*, 53 Ala. 70, and declaring *North Birmingham Street Railway Co. v. Calderwood*, 89 Ala. 254, explained and qualified by later cases.) *Ib.* 412.
5. *Recklessness, or willful or intentional wrong, as avoiding contributory negligence.*—Under a complaint which alleges that plaintiff's injuries were inflicted wantonly, willfully and intentionally, a recovery can not be had on proof of simple negligence merely, nor is contributory negligence a defense to the action; but a count which charges that the injury was caused "negligently, carelessly, and recklessly," is not the equivalent of a charge that it was done wantonly, willfully or intentionally. *Ib.* 412.
 6. *Negligence in sudden application of brake to hand-car.*—If the foreman of a hand-car on a railroad track, knowing that the men who work the handles of the lever sometimes let go the handle after pushing it down, on a down grade, having nothing else to hold on to, suddenly applies the brakes and stops the car, without notice to them, and without looking to see that none of them are in such dangerous position, "the inference of negligence is clear and certain," and the court may instruct the jury that this is negligence. *Ib.* 412.
 7. *Same; custom as to notice.*—The foreman of a hand-car on a railroad track, stopping it suddenly by an application of the brake while moving rapidly on a down grade, at a place where it was not usual to stop, and without giving notice to the men working the lever, may be guilty of negligence, if the jury so find, without proof of any custom requiring him to give notice. *Ib.* 412.
 8. *Variance in description of injuries complained of.*—Where the complaint alleges that the plaintiff's intestate was killed in the discharge of his duties as brakeman, "while ascending the side of the car," by coming in contact with a water-tank which had been placed too near the railroad track, and the evidence shows that, when struck by the tank, he was standing on the platform between two cars, with his back towards the tank, the variance is fatal. *Hood v. Pioneer M. & M. Co.*, 461.
 9. *Proof of negligence and consequent injury.*—In an action to recover damages for personal injuries, it is not enough for the plaintiff to show negligence on the part of the defendant and injury to himself, but he must adduce some evidence tending to show that the injury resulted from the negligence, and the instinct of self-preservation on his part can not supply the place of this; yet, where there is any evidence from which the jury might legally infer a casual connection between the negligence and the injury, the question should be submitted to them. *Bromley v. B. Mineral Railroad Co.*, 397.
 10. *Same; injuries to brakeman on top of car.*—Plaintiff's intestate, a brakeman on a freight train which had separated into two parts, and whose duty it was at once to apply the brakes, was last seen alive while standing near the brake on top of a rear car, and a few moments afterwards, the car having run over him, his body was found lying between the rails. No one saw him fall, and there was no evidence as to the circumstances immediately attending his death; but it was shown that there was a foot-board across the top of the car for him to walk on, and a hole three or four feet wide in the car which extended to or under the foot-board, and existence of which was known to the conductor.

NEGLIGENCE—CONTINUED.

Held, that the question should have been submitted to the jury whether the hole in the roof caused the injury. *Ib.* 397.

11. *Proof of relationship and dependency, as affecting measure of damages*—In a statutory action against the employer, by the personal representative of a deceased employe (Code, § 2590), it is not error to exclude proof of the fact that the deceased left a wife and minor child dependent on him, unless followed by an offer to prove his expenditures on their account. When such additional evidence is adduced, the measure of recovery is declared in *L. & N. Railroad Co. v. Trammell*, 93 Ala. 350, and *McAdory v. L. & N. Railroad Co.*, 94 Ala. 272. *Ib.* 397.
12. *Sufficiency of complaint in averments of negligence.*—In an action for damages against railroad company, by the administrator of a person who was run over and killed by a train of cars within the corporate limits of a city or town, a count which avers that the engineer did not blow the whistle or ring the bell at short intervals while moving through the city, and that "owing to such failure said intestate was killed," and a count which avers that the accident occurred near a public crossing, that the engineer did not blow the whistle or ring the bell at least one-fourth of a mile before reaching said crossing, and continue to do so at short intervals until he had passed the crossing, "and that said intestate was killed on account of such omission;" and a count which avers that, "at the time of the killing of said intestate, said engine was being run negligently in this, it was a dark night, the engine had no head-light, and was being run rapidly, and on account of said negligence said intestate was killed,"—each is sufficient in its averments of negligence. But a count which shows that the intestate was a mere trespasser on the railroad track at the time he was killed, or was otherwise guilty of contributory negligence, must allege or show more than simple negligence on the part of the persons in charge of the train—must show wanton or reckless negligence on their part, or intentional injury. *Sav. & W. Railroad Co. v. Meadors*, 138.
13. *Correspondence of pleadings and proof.*—Under a count which avers simple negligence, in an action to recover damages for personal injuries, a recovery may be had on proof of wanton or reckless negligence. *Ib.* 138.
14. *Statutory duties of engineer; failure to perform as negligence.*—The statutory duty imposed on the engineer of a railroad train moving or passing through a city or town, to blow the whistle or ring the bell at short intervals (Code, § 1144), is co-extensive with the corporate limits of the city or town; but the failure to perform this duty is simple negligence merely, and is not sufficient to overcome the defense of contributory negligence on the part of plaintiff or his intestate. *Ib.* 138.
15. *Contributory negligence, and how overcome as defense.*—A person who walks on a railroad track at night, in a deep cut four or five hundred yards long, within the corporate limits of a city or town, where there are no intersecting streets or crossings, is a mere trespasser, and being run over and killed by a train approaching from behind, his contributory negligence prevents a recovery of damages by his personal representative, unless it is shown that the person in charge of the train discovered him in time to avoid the injury, and failed to exercise due care and diligence to avoid it. *Ib.* 138.

See, also, RAILROADS.

NEW TRIAL.

1. *New trial; revision of order granting or refusing.*—Under the statute giving an appeal to this court from an order granting or refusing a new trial (Sess. Acts 1890-91, p. 779), two rules have been declared, to which the court adheres: (1) when the appeal is from an order refusing to grant a new trial on account of the insufficiency of the evidence, or because the verdict is contrary to the evidence, this court will not disturb the decision, unless, after allowing all reasonable presumptions in favor of its correctness, the preponderance of the evidence against the verdict is so decided as to convince the court that it is wrong and unjust; and (2) when the appeal is from an order granting a new trial, the decision will not be reversed unless the evidence plainly and palpably supports the verdict. *White v. Blair*, 147.
2. *New trial, on ground of accident, mistake, or surprise.*—When a party applies for a new trial in an action at law, on the ground of accident or mistake operating a surprise, such as the failure to summon material witnesses, which was not discovered until the cause was called for trial, or after the trial was begun, he must show that he then moved for a continuance, or took other proper steps to postpone the trial until the attendance of the absent witnesses could be procured. *Hoskins v. Hight*, 284.
3. *Same.*—A new trial should not be granted on account of the absence of material witnesses who were never summoned, where it appears that the clerk was never instructed to summon them; and it is immaterial whether the failure to so instruct the clerk was the fault of the party himself, his attorney, or his attorney's clerk. *Id.* 284.
4. *Rehearing at law after final judgment; amendment of petition, and substitution of lost papers.*—A judgment of the appellate court, on application for *mandamus*, vacating and annulling an order granting a *supersedeas* and rehearing after final judgment, or requiring the lower court to vacate and annul it, because it was rendered in vacation, leaves the petition itself still pending and unaffected; and it is the duty of the lower court to proceed with it, hearing demurrers, allowing proper amendments, substitution of lost papers, &c., as in other cases. *Seymour v. Farquhar & Son*, 527.
5. *Refusal of new trial.*—The overruling of a motion for a new trial in a criminal case is not revisable, though an appeal is given by statute in a civil case. *Reeves v. State*, 31.

NON-CLAIM. See ESTATES OF DECEDENTS, 8, 9.

NONSUIT. See BILL OF EXCEPTIONS, 5.

NUISANCE.

1. *Nuisance defined.*—While it is difficult, if not impracticable, to formulate a rule accurately defining the acts or facts which will constitute a nuisance under any and all circumstances, it may be stated as a general proposition, that any establishment erected on his premises by the owner, though for the purpose of trade or business lawful in itself, which, from the situation, the inherent qualities of the business, or the manner in which it is conducted, directly causes substantial injury to the property of another, or produces material annoyance and inconvenience to the occupants of adjacent dwellings, rendering them physically uncomfortable, is a nuisance; and this principle has been applied to smoke, offensive odors, noises and vibrations, caused by the operation of gas-works, electric-light works, various factories and other industries located in a city. *English v. Progress Electric Light Co.*, 259.
2. As to abatement of a nuisance by injunction, see CHANCERY, 7, 8.

OVERRULED CASES.

1. *Boynnton v. State*, 77 Ala. 29, limited by *Ex parte Davis*, 9.
2. *Government St. Railroad Co. v. Hanlon*, 53 Ala. 70, overruled by *K. M. & B. Railroad Co. v. Crocker*, 412.
3. *Gunn v. Howell*, 27 Ala. 663, criticized in *Kohn, Leberman & Co. v. Haas*, 481.
4. *N. B. Street Railway Co. v. Calderwood*, 89 Ala. 254, explained and limited in *K. M. & B. Railroad Co. v. Crocker*, 412.
5. *Prewitt v. Ashford*, 90 Ala. 284, overruled by *Jones v. Woodstock Iron Co.*, 551.
6. *Rakes v. Pope*, 7 Ala. 161, limited by *Manning v. Pippen*, 537.

OYSTERS. See CONSTITUTIONAL LAW, 1, 2, 3.

PARTITION.

1. *Claim of adverse possession; issue at law.*—In a suit for the partition of land between tenants in common, if the defendant claims adverse possession of the entire tract, this does not oust the jurisdiction of the court, but requires a suspension of the proceedings until the disputed ownership can be settled on an issue made up and submitted to a jury. *Sibley v. Alba*, 191.

PARTITION FENCES.

1. *Partition fences; repair or removal by either party.*—A fence erected on the line between two co terminous proprietors, or recognized by them as being on the line, though not so in fact, is a partition fence, and belongs to them as tenants in common (Code, § 1370); either may repair it, and may lawfully enter on the land of the other for that purpose; but, if he destroys it, or removes it on his own land, he is liable in trover at the suit of the other tenant, and also in trespass if he entered on the land of the other in making the removal. *Garrett v. Sewell*, 456.
2. *Same; who may maintain trover or trespass.*—If the plaintiff's land was rented out at the time the fence was removed by the defendant, he can not maintain either trover or trespass, which lies only in favor of one who has either the actual possession or the immediate right of possession; but, if only the cleared land was rented out, while the fence which was removed extended through the wood-land beyond, he has a right of action for the latter part. *Ib.* 456.

PARTNERSHIP.

1. *Articles of partnership construed.*—Under written articles of partnership signed by D. C. A. and A. D. A. only, and containing these stipulations: (1) that the capital stock of the firm shall be \$1,500; (2) that each of said partners shall pay an equal part of the necessary expenses in carrying on the business; (3) that said partners "agree and hereby promise to pay J. D. A. one-third of the net profits of said mercantile business for the use of his storehouse, trade and influence, and for the loan of \$500, and more if he thinks it advisable;" (4) "that the remaining two-thirds of the net profits shall be divided between the said partners, D. C. A. and A. D. A., share and share alike;" and (5) "that neither partner shall draw any money from the partnership funds, nor contract any debt against the firm, without the consent of the other partner;"—J. D. A. does not appear to be a partner. *Levy & Co. v. Alexander*, 101.
2. *Liability as partner to creditors.*—A person may be liable as a partner to creditors of the partnership, although he was not a partner in fact; but, to render him so liable, it must be shown that he was held out to the public as a partner with his knowledge

PARTNERSHIP—CONTINUED.

- and consent, and that the creditor contracted with the partnership on the faith and belief that he was a partner. *Ib.* 101.
3. *Declarations of partner, as hearsay.*—A partner can not testify to a loan of money, or other partnership transaction, when he knows nothing about the matter except as informed by the other partners. *Moore, Marsh & Co. v. Penn & Co.*, 200
 4. *Receiver between partners.*—In a suit for the settlement of partnership accounts, a receiver will not be appointed at the instance of complainant, when the defendant, who has possession of all the property alleged to belong to the partnership, denies the existence of any partnership, and it is entirely solvent and able to respond in damages. *Irwin v. Eversum*, 64.
 5. *Set-off, or payment; partnership and individual demands.*—In an action by a partnership on an account for goods sold and delivered, the defendant can not claim a set-off for the price of a horse sold by him to one of the partners individually; nor is he entitled to claim it as a credit, or partial payment, because the partner so promised, when it is shown that the other partners repudiated his promise. *Cowen v. Eartherly Hardware Co.*, 324.
 6. *Same.*—In an action by the assignee of an account in favor of a partnership, the defendant can not set off a debt due to him by each of the partners individually; as where he paid a debt for which he and one of the partners were equally liable as former partners, and the other partner, on buying out his interest in the former partnership, assumed to pay his half of that debt. *Boykin v. Persons*, 628.
 7. *Appropriation of partnership assets in payment of partner's individual debt.*—One partner can not, without the authority or consent of the other, appropriate the partnership assets to the payment of his individual debt, as by agreeing to let his creditor take up partnership goods in payment *pro tanto*. *Ib.* 628.

PAYMENT.

1. *Check or order of third person as payment.*—Where plaintiff, desiring to purchase an overcoat, procured an order for one from a third person, and presented it to the tailor to whom it was addressed, who thereupon took it, and promised to make the overcoat; but, the drawer of the order having failed in business before the coat was finished, refused to deliver it without payment; *held*, that the plaintiff could not recover for a breach of contract, unless the evidence showed that the order was accepted as payment for the debt. *Williams v. Costello*, 592.
2. *Burden of proof as to payment, in action on note.*—In an action on a promissory note, the only plea being payment, the production of the note makes out a *prima facie* case for the plaintiff; and the evidence as to payment being evenly balanced, he is entitled to a verdict. *Nelson v. Larmer*, 300.

PLEADING AND PRACTICE.

1. *Sufficiency of complaint; amendment.*—In an action on a judgment, properly describing it, additional averments as to the contract on which it is founded, are unnecessary and superfluous; and a count added by amendment, containing a fuller description of the contract, is not a departure, nor objectionable as effecting a misjoinder. *Sims v. Herzfeld*, 145.
2. *Superfluous averments in complaint.*—If the defendant takes no proper steps to eliminate false issues presented by the com-

PLEADING AND PRACTICE—CONTINUED.

- plaint, evidence may be received to support them, and they may be submitted to the jury. *Ib.* 145.
3. *Description of goods in complaint.*—In trespass for wrongfully seizing a stock of goods, it is sufficient to describe them in the complaint as "a stock of general merchandize formerly owned by L. & Brother, consisting of dry goods, groceries, hardware, &c., in the town of R., and in the M. building." *Jos. ph v. Henderson*, 213.
 4. *Whether count is in case or trespass.*—A count which claims damages for that the defendant "wrongfully caused an attachment," which he had sued out against a third person, "to be levied on a certain stock of goods which was the property of the plaintiff, but which was at that time in the possession of the sheriff under the levy of prior attachments sued out by other persons," and avers that, "by reason of such wrongful levy, said goods were wholly lost to plaintiff by the sale thereof by the sheriff under defendant's said attachment," is in case, and shows a good cause of action. *Ib.* 213.
 5. *Description of plaintiff as partnership or corporation; amendment of affidavit.*—In an action commenced by attachment in the name of "*H. B. Clafin Company*," without other descriptive words, an amended affidavit may be filed (Code § 2994), alleging that the plaintiff is a corporation. *Rosenberg v. Clafin Co.*, 249.
 6. *Sufficiency of statement, or complaint.*—In a case commenced in a justice's court, a statement or complaint, claiming "\$100 for a mule that plaintiff sold to defendant," shows a substantial cause of action, and is sufficiently definite and certain. *Smith v. Dick*, 311.
 7. *Complaint; averment of performance.*—In a count on a special written contract for building a house, to recover the balance due, an averment that plaintiffs "have complied with all the provisions of the contract on their part, and erected said building according to said contract," is a sufficient averment of performance (Code, p. 791, Form No. 9); and it is unnecessary to further aver that plaintiff procured and furnished the certificate of the architect that the work was completed according to the terms of the contract, as required by one of its provisions. *Davis v. Badders & Britt*, 348.
 8. *Recovery under common counts.*—Under a count on a special written contract for building a house, a recovery can not be had without proof of full performance according to its terms; but a recovery may be had under the common count for work, labor and materials, on proof that defendant moved into the house before completion, continued to occupy it after the contractor quit working on it, and that it was of benefit to him. *Ib.* 348.
 9. *Same.*—When the contract requires that the plaintiff, claiming the last installment of the agreed price, shall procure the architect's certificate as to the full and proper completion of the house, or other work to be done, it may be that a recovery can not be had under a special count on the contract, without proof that the certificate was procured, or that it was obstinately or unreasonably withheld; but a recovery may be had under the common counts, for work and labor done and materials furnished, on proof of its acceptance and its value, without regard to the architect's certificate. *Ib.* 348.
 10. *Joinder of common counts with special.*—A special count, claiming damages for the breach of a contract of employment, may be joined with the common counts for work and labor and on an account stated. *Clark v. Ryan*, 406.

PLEADING AND PRACTICE—CONTINUED.

11. *Breach of contract by corporation; averments of complaint.*—In an action against a railroad company by a contractor for the construction of a branch road, alleging the execution of the contract and its breach by the defendant, it is not necessary further to allege that the construction of the branch road was authorized by resolution of the board of directors, ratified and approved by a vote of a majority of the stockholders in value; that being merely defensive matter, and the presumption being that such preliminary action was had before the work of construction was entered on. *Arrington v. Sav. & Western Railroad Co.*, 434.
12. *Sufficiency of complaint in averments of negligence.*—In an action for damages against a railroad company, by the administrator of a person who was run over and killed by a train of cars within the corporate limits of a city or town, a count which avers that the engineer did not blow the whistle or ring the bell at short intervals while moving through the city, and that "owing to such failure said intestate was killed;" and a count which avers that the accident occurred near a public crossing, that the engineer did not blow the whistle or ring the bell at least one-fourth of a mile before reaching said crossing, and continue to do so at short intervals until he had passed the crossing, "and that said intestate was killed on account of such omission;" and a count which avers that, "at the time of the killing of said intestate, said engine was being run negligently in this, it was a dark night, the engine had no head-light, and was being run rapidly, and on account of said negligence said intestate was killed,"—each is sufficient in its averments of negligence. But a count which shows that the intestate was a mere trespasser on the railroad track at the time he was killed, or was otherwise guilty of contributory negligence, must allege or show more than simple negligence on the part of the persons in charge of the train—must show wanton or reckless negligence on their part, or intentional injury. *Sav. & Western Railroad Co. v. Meadors*, 138.
13. *Correspondence of pleadings and proof.*—Under a count which avers simple negligence, in an action to recover damages for personal injuries, a recovery may be had on proof of wanton or reckless negligence. *Ib.* 138.
14. *Same.*—Under a complaint which alleges that plaintiff's injuries were inflicted wantonly, willfully and intentionally, a recovery can not be had on proof of simple negligence merely, nor is contributory negligence a defense to the action; but a count which charges that the injury was caused "negligently, carelessly, and recklessly," is not the equivalent of a charge that it was done wantonly, willfully or intentionally. *K. M. & B. Railroad Co. v. Crocker*, 412.
15. *Facts averred or shown by pleading of opposite party.*—Facts which are averred in the complaint need not be pleaded in defense, or, if set up in a plea, as a general rule, need not be proved by the plaintiff. So far as the rights of the plaintiff are concerned, the defendant may consider facts averred in the complaint to be true. *Dundee Mortgage Co. v. Nixon*, 318.
16. *Demurrer good only in part.*—A demurrer which is good in part only, should be overruled entirely. *Godwin v. Whitehead*, 409.
17. *Specification of grounds of demurrer.*—When the judgment-entry recites that a demurrer was sustained to a special plea, but the record does not show what grounds of demurrer, if any, were

PLEADING AND PRACTICE—CONTINUED.

- specified, this court can not review the ruling. *Rosenberg v. Claflin Co.*, 249.
18. *Same; presumption in favor of judgment.*—When a demurrer is sustained to a plea, but the grounds of demurrer, if any were specified, are not shown by the record, the ruling will be affirmed, if the plea is demurrable for any cause. *Smith v. Dick*, 311.
19. *Same.*—When a demurrer to a plea is overruled, and the record does not show what grounds of demurrer, if any, were specified (Code, § 2690), this court will presume that none were specified, or that those specified were insufficient; and will not consider the sufficiency of the plea. *Dundee Mortgage Co. v. Nixon*, 318.
20. *Issue on defective plea.*—When issue is joined upon a defective plea, and the evidence sustains it, the defendant has the right to have the court charge the jury upon such plea. *Ib.* 318.
21. *Same.*—When issue is joined on a defective plea, and the evidence clearly establishes its truth, the court should instruct the jury, on request, to find for the defendant if they believe the evidence, leaving the plaintiff to ask a replender. *Kearney v. Kling*, 280.
22. *Issue on immaterial or defective plea.*—When issue is joined, without objection, on an immaterial or defective plea, the defendant is entitled to adduce evidence in support of it, and is entitled to verdict and judgment if the evidence sustains it, the plaintiff's remedy being to ask for a replender. *James v. Hagler*, 529.
23. *Filing pleadings; what is revisable.*—Leave to file a replication to a plea in abatement, after the expiration of the time allowed by the rules of practice, rests in the discretion of the court, and its refusal is not revisable. *Donald Bros. v. Nelson & Sons*, 111.
24. *Plea of failure of consideration.*—A plea of failure of consideration, not stating the facts, is demurrable on that account, when not pleaded "in short by consent." *Sims v. Herzfeld*, 145.
25. *Plea of nul tiel corporation.*—Under statutory provisions (Sess. Acts 1888-9, p. 57), a plea denying plaintiff's corporate existence must be verified by affidavit. *Rosenberg v. Claflin Co.*, 249.
26. *Plea denying each and every allegation of complaint.*—In an action by a corporation, the complaint containing the common counts only, a plea denying "each and every allegation of the complaint" amounts only to the general issue. *Ib.* 249.
27. *Plea to jurisdiction.*—In a case pending in the Probate Court, on the petition of a widow for an allotment of lands in lieu of homestead (Code, § 2544), a plea to the jurisdiction which alleges that a bill has been filed to remove the administration and settlement of the estate into the Chancery Court, and that said court has assumed jurisdiction of the suit, is good and sufficient, although it does not set out the bill *in extenso*, and does not allege that the matters embraced in the petition were removed as part of the administration. *Tygh v. Dolan*, 269.
28. *Plea to complaint, good only as to one count.*—A plea to the whole complaint, good only as to one of the counts thereof, is demurrable on that account. *Smith v. Dick*, 311.
29. *Contributory negligence as defense, and how pleaded.*—In an action to recover damages for personal injuries, contributory negligence on the part of the plaintiff himself is defensive matter in the nature of confession and avoidance, must be specially pleaded (Code, § 2675), and is not available under the general issue. (*Overruling Government Street Railway Co. v. Hanlon*, 53

PLEADING AND PRACTICE—CONTINUED.

- Ala. 70, and declaring *North Birmingham Street Railway Co. v. Calderrwood*, 89 Ala. 254, explained and qualified by later cases.) *K. M. & B. Railroad Co. v. Crocker*, 412.
30. *Presumptions as to pleas.*—When no pleas are set out in the record, but it shows that trial was had on issue joined, and that special defenses were considered by the court below without objection, the appellate court will presume, in favor of the judgment, that proper pleas were filed to let in those defenses; but, when the only plea set out in the record is the general issue, the appellate court will not presume, in favor of a reversal, that special pleas were also filed; nor will such presumption be indulged because the bill of exceptions shows that plaintiff introduced evidence bearing on such defenses, in rebuttal of defendant's evidence in support of them, nor because he asked charges based on them. *Ib.* 412.
 31. *Error without injury in ruling on pleas.*—Sustaining a demurrer to a plea, if erroneous, is error without injury, when the defendant had the benefit of the same defense under another plea, on which issue was joined. *Rosenberg v. Clafin Co.*, 249; *Sims v. Herzfeld*, 145; *Agnew v. Walden & Son*, 108.
 32. *Error without injury in ruling on pleadings.*—The sustaining of a demurrer to the original complaint, if erroneous, is error without injury, when the record shows that the plaintiff had the full benefit of the same issues under the amended complaint. *Bromley v. B. Mineral Railroad Co.*, 397.
 33. *Repugnant defenses.*—When the defendant, claiming under a conveyance from a judgment-debtor, has successfully excluded evidence assailing the conveyance for fraud, on the ground that the property conveyed was the homestead of the debtor, he is precluded from afterwards contending that it was not in fact the debtor's homestead. *Hodges v. Winston*, 514.

RAILROADS.

1. *Railroad company's right of way; nature of title.*—Land acquired by a railroad company for its right-of-way, whether by condemnation proceedings or by purchase or grant from the owner, is its private property, though charged with a public use; and the public can not claim any interest in it, as in lands dedicated to the public use. *Elyton Land Co. v. S. & N. Railroad Co.*, 631.
2. *Use of right-of-way by railroad company.*—Land which a railroad company has acquired for a right-of-way may, unless restrained by the terms of the grant, be appropriated to the erection of depots or other buildings necessary or proper for the transaction of its ordinary business. *Ib.* 631.
3. *Construction of branch road by railroad corporation.*—A grant of corporate power to build and operate a railroad between specified *termini* carries with it the right to construct turn-outs, sidings, switches, stations and engine-houses, and all works and appendages usual in the convenient operation of a railroad; but the right to purchase, extend or construct a "branch road" on or from any point on its line is limited and governed by statutory provisions (Code, §§ 1587-8), and such purchase, extension or construction can only be made by a resolution of the board of directors, ratified and approved by a subsequent vote of the majority in value of the stockholders. *Arrington v. Sav. & Western Railroad Co.*, 434.
4. *Liability of railroad company for injuries to stock; general charge on evidence.*—In an action against a railroad company to recover

RAILROADS—CONTINUED.

- damages for injuries to several mules, which were run over by a freight train before daybreak one frosty morning, as the train was crossing a trestle over a small creek, the defendant is entitled to the general affirmative charge on the evidence, when the engineer of the train testifies that he did not see the animals until he was within ten feet of them, and could not see them sooner because of a dense fog, about one hundred yards wide, which covered the track at that point, extending up and down the creek; there being no evidence in conflict with his testimony, and none which authorized an inference inconsistent with it. *Central R. & B. Co. v. Ingram*, 152.
5. *Same; statutory duties of engineer.*—Under statutory provisions, it is made the duty of the engineer of a railroad train, on perceiving any obstruction on the track, to use all means in his power to stop the train, and, if stock is killed or injured, the onus is on the company to show a compliance with this requirement (Code, §§ 1144, 1147); but this duty does not arise, unless the obstruction is on the track, and is perceived by the engineer; and a compliance with it is not required, when it is shown that the animal was not discovered in time to avoid the injury, and that the failure to discover it sooner was not owing to any want of due care and watchfulness. *Sav. & Western Railroad Co. v. Jarvis*, 149.
 6. *Same; general charge on evidence.*—In an action against a railroad company to recover damages for killing stock, proof of the killing makes out a *prima facie* case for the plaintiff, and the sufficiency of the evidence to rebut the presumption of negligence is a question for the jury; hence, the general charge in favor of the defendant is properly refused. *Ib.* 149.
 7. *Railroad corporation under charter granted by two or more States.* The Memphis & Charleston Railroad Company, incorporated by legislative acts in Alabama, Tennessee and Mississippi, though under the same name, owned by the same stockholders, invested with like franchises, and operated under the same management, is composed of three separate legal entities; and the averment that it "is a unit as a corporation" is the mere statement of a legal conclusion, unsupported by the facts. *Kahl v. M. & C. Railroad Co.*, 337.
 8. *Action against railroad in Alabama, for tort committed in Mississippi.* An action can not be maintained against a railroad corporation in Alabama, for a tort committed in Mississippi, unless the tort was actionable at common law, or is shown to be actionable by statute in Mississippi. *Ib.* 337.
 9. *Travelling on forfeited ticket.*—A regulation adopted by a railroad company requiring a passenger who is found travelling without a ticket, or on a ticket which has been forfeited, to pay for the part of the route already passed over, as well as the part yet to be travelled, is a reasonable rule; and on his failure or refusal to comply with it, the passenger may be ejected. *Manning v. L. & N. Railroad Co.*, 392.
 10. *Trespassers on railroad track; in thickly populated part of city or town.*—When a railroad track runs through a thickly populated part of a city, town or village, where the demands of trade and public intercourse necessitate the frequent crossing of the track, it is the duty of those operating an engine along the track to keep a diligent lookout for persons who may be on it; not because such duty is specially imposed by statute, but because it arises from the particular facts and circumstances, which make

RAILROADS—CONTINUED.

it probable that persons are on the track, and that injury may result unless due care is observed; and the duty only arises when the two facts co-exist, (1) a custom or usage in crossing the tract at that place, and (2) the demands of trade and intercourse justifying it. But the track of a railroad can not be converted into a road for ordinary travel, and one who undertakes to make such use of it is a trespasser. (This is "the extent of the rule declared in *M. & C. R. R. Co. v. Womack*, 84 Ala. 150, and in accord with *Geo. Pac. R. R. Co. v. Blanton*, 84 Ala. 154; and as thus qualified, the case of *S. & N. Ala. R. R. Co. v. Donovan*, 84 Ala. 146, is reaffirmed.") *Sav. & Western Railroad Co. v. Meadors*, 137.

11. *Same; contributory negligence, and how overcome as defense.*—A person who walks on a railroad track at night, in a deep cut four or five hundred yards long, within the corporate limits of a city or town, where there are no intersecting streets or crossings, is a mere trespasser, and being run over and killed by a train approaching from behind, his contributory negligence prevents a recovery of damages by his personal representative, unless it is shown that the person in charge of the train discovered him in time to avoid the injury, and failed to exercise due care and diligence to avoid it. *Ib.* 137.
12. *Statutory duties of engineer; failure to perform as negligence.*—The statutory duty imposed on the engineer of a railroad train moving or passing through a city or town, to blow the whistle or ring the bell at short intervals (Code, § 1144), is co-extensive with the corporate limits of the city or town; but the failure to perform this duty is simple negligence merely, and is not sufficient to overcome the defense of contributory negligence on the part of plaintiff or his intestate. *Ib.* 137.
13. *Sufficiency of complaint in averments of negligence.*—In an action for damages against a railroad company, by the administrator of a person who was run over and killed by a train of cars within the corporate limits of a city or town, a count which avers that the engineer did not blow the whistle or ring the bell at short intervals while moving through the city, and that "owing to such failure said intestate was killed;" and a count which avers that the accident occurred near a public crossing, that the engineer did not blow the whistle or ring the bell at least one-fourth of a mile before reaching said crossing, and continue to do so at short intervals until he had passed the crossing, "and that said intestate was killed on account of such omission;" and a count which avers that, "at the time of the killing of said intestate, said engine was being run negligently in this, it was a dark night, the engine had no head-light, and was being run rapidly, and on account of said negligence said intestate was killed;"—each is sufficient in its averments of negligence. But a count which shows that the intestate was a mere trespasser on the railroad track at the time he was killed, or was otherwise guilty of contributory negligence, must allege or show more than simple negligence on the part of the person in charge of the train—must show wanton or reckless negligence on their part, or intentional injury. *Ib.* 137.
14. *Correspondence of pleadings and proof.*—Under a count which avers simple negligence, in an action to recover damages for personal injuries, a recovery may be had on proof of wanton or reckless negligence. *Ib.* 137.
15. *Variance in description of injuries complained of.*—Where the com-

RAILROADS—CONTINUED.

- plaint alleges that the plaintiff's intestate was killed in the discharge of his duties as brakeman, "while ascending the side of the car," by coming in contact with a water-tank which had been placed too near the railroad track, and the evidence shows that, when struck by the tank, he was standing on the platform between two cars, with his back towards the tank, the variance is fatal. *Hood v. Pioneer M. & M. Co.*, 461.
16. *Recklessness, or willful or intentional wrong.*—Under a complaint which alleges that plaintiff's injuries were inflicted wantonly, willfully and intentionally, a recovery can not be had on proof of simple negligence merely, nor is contributory negligence a defense to the action; but a count which charges that the injury was caused "negligently, carelessly, and recklessly," is not the equivalent of a charge that it was done wantonly, willfully or intentionally. *K M. & B. Railroad Co. v. Crocker*, 412.
 17. *Injuries to employe by negligence in management of hand-car, or lever-car.*—A lever-car, or car propelled by hand, such as is in general use on railroads by the workmen engaged in repairing and keeping up the track, is within the spirit and terms of the statute (Code, § 2590, subd. 5) which gives an action against the employer for injuries suffered by an employe by reason of the negligence of any person in the service who has charge of "any signal, points, locomotive, engine, switch, car, or train upon a railway." *Ib.* 412.
 18. *Relevancy of evidence as to cause of stoppage of car.*—Plaintiff's injuries having been caused by the sudden stoppage of the hand-car on which he was an employe, the foreman applying the brake without notice, and there being no evidence that an extra train was heard or seen approaching, the defendant company can not be allowed to prove that, by a rule of the company, it was made the duty of the person in charge of the hand-car at once to stop and remove it from the track when a train was seen or heard approaching. *Ib.* 412.
 19. *Negligence in sudden application of brake to hand-car.*—If the foreman of a hand car on a railroad track, knowing that the men who work the handles of the lever sometimes let go the handle after pushing it down, on a down grade, having nothing else to hold on to, suddenly applies the brake and stops the car, without notice to them, and without looking to see that none of them are in such dangerous position, "the inference of negligence is clear and certain," and the court may instruct the jury that this is negligence. *Ib.* 412.
 20. *Negligence in stopping hand-car suddenly; custom as to notice.*—The foreman of a hand-car on a railroad track, stopping it suddenly by an application of the brake while moving rapidly on a down grade, at a place where it was not usual to stop, and without giving notice to the men working the lever, may be guilty of negligence, if the jury so find, without proof of any custom requiring him to give notice. *Ib.* 412.
 21. *Proof of negligence and consequent injury.*—In an action to recover damages for personal injuries, it is not enough for the plaintiff to show negligence on the part of the defendant and injury to himself, but he must adduce some evidence tending to show that the injury resulted from the negligence, and the instinct of self-preservation on his part can not supply the place of this; yet, where there is any evidence from which the jury might legally infer a causal connection between the negligence and

RAILROADS—CONTINUED.

- the injury, the question should be submitted to them. *Bromley v. Bir. Mineral Railroad Co.*, 397.
22. *Same; injuries to brakeman on top of car.*—Plaintiff's intestate, a brakeman on a freight train which had separated into two parts, and whose duty it was at once to apply the brakes, was last seen alive while standing near the brake on top of a rear car, and a few moments afterwards, the car having run over him, his body was found lying between the rails. No one saw him fall, and there was no evidence as to the circumstances immediately attending his death; but it was shown that there was a foot-board across the top of the car for him to walk on, and a hole three or four feet wide in the car which extended to or under the foot-board, and existence of which was known to the conductor. *Held*, that the question should have been submitted to the jury whether the hole in the roof caused the injury. *Ib.* 397.
23. *Proof of relationship and dependency, as affecting measure of damages*—In a statutory action against the employer, by the personal representative of a deceased employe (Code, § 2590), it is not error to exclude proof of the fact that the deceased left a wife and minor child dependent on him, unless followed by an offer to prove his expenditures on their account. When such additional evidence is adduced, the measure of recovery is declared in *L. & N. Railroad Co. v. Trammell*, 93 Ala. 350, and *McAdory v. L. & N. Railroad Co.*, 94 Ala. 272. *Ib.* 397.

RECEIVER. See CHANCERY, 10, 11, 13.

REHEARING. See NEW TRIAL.

ROADS AND STREETS.

1. *Dedication of street in prospective city or town.*—*Held*, as matter of fact, on consideration of the evidence in this case, that the original proprietors, under grant from the United States, of the land on which the town of Demopolis was laid off in 1819, dedicated to the public use as a highway the strip of land lying on the margin of the river, marked on the first map or plat of the town as Arch street, intending to afford to the purchasers of lots and citizens of the embryo town the advantages of free and uninterrupted access to the river, a highway of commerce. *Held*, also, as matter of law, that lots having been sold abutting on the street, and the map having been adopted as showing the limits of the town by the legislative act incorporating it, this dedication became accepted and perfect; and the validity of the dedication was not affected by the fact that said street, in its condition at that time, following the bends of the river, was in several places not susceptible of use as a highway, but required the expenditure of labor and money to make it passable. *Webb v. Demopolis*, 116.
2. *Right of city to erect wharves at river landing.*—A city, or incorporated town, situated on a navigable river, can not, it seems, engage in the business of wharfing, erecting wharves, providing keepers thereof, and charging the public for their use in going or carrying property to and from the river, unless that power is conferred by special legislative act; but, when one of its streets, as laid off and dedicated to the public by the original proprietors of the land, extends along the margin of the river through its limits, the city necessarily has the implied right to construct suitable and convenient approaches to the water-line, and to make structures or excavations even beyond

ROADS AND STREETS—CONTINUED.

- the water-line, such as are reasonably necessary and proper to enable the public to avail themselves of the rights of commerce and transportation afforded by the river, but having regard to the superior rights of navigation. *Ib.* 116.
3. *Private use of public street, as affected by statute of limitations, lapse of time, equitable estoppel, or prescription.*—A city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or *laches* in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to maintain a suit in equity to remove the obstruction. *Ib.* 116.
 4. *What is a public road.*—A public road can only be established by order of the Commissioners Court, or acquired by the public by dedication or prescription; and a road which, turning out from the main road at a point where a temporary obstruction is sometimes caused by a sand-bed, runs parallel with it for a few hundred yards, and returns into it beyond the sand-bed, does not constitute a "public road" under the statute which makes it a misdemeanor to shoot along or across a public road. Code, § 4095. *McDade v. State*, 28.

SET-OFF.

1. *Partnership and individual demands.*—In an action by the assignee of an account in favor of a partnership, the defendant can not set off a debt due to him by each of the partners individually; as where he paid a debt for which he and one of the partners were equally liable as former partners, and the other partner, on buying out his interest in the former partnership, assumed to pay his half of that debt. *Boykin v. Persons*, 628.
2. *Same.*—In an action by a partnership on an account for goods sold and delivered, the defendant can not claim a set-off for the price of a horse sold by him to one of the partners individually; nor is he entitled to claim it as a credit, or partial payment, because the partner so promised, when it is shown that the other partners repudiated his promise. *Cowen v. Eartherly Hardware Co.*, 324.

SHERIFF.

1. *Appointment of deputy by sheriff, and proof thereof; filing oath of office.*—A sheriff may be held liable for the default of a third person as his deputy, although he denies the fact of appointment, on proof of the performance of official acts by the person claiming to be a deputy, with his knowledge and in his presence, and his subsequent recognition of such acts; and the fact that the deputy's oath of office was filed in the office of the clerk of the City Court, instead of the judge of probate (Code, § 258), does not affect the question of the sheriff's liability for his official acts. *Mathis v. Carpenter*, 156.
2. *Officials bonds of sheriff as evidence.*—In an action (or summary proceeding) against a sheriff and the sureties on two official bonds given by him, pleas being filed by all of the defendants jointly, the bonds can not be excluded from the jury as evidence because two of the sureties on the first bond were not on the second. *Ib.* 156.
3. *Bond of indemnity, as justifying or requiring levy.*—When an attachment is placed in the hands of a sheriff to be levied, a bond of indemnity given, and property pointed out which is

SHERIFF—CONTINUED.

prima facie subject to levy, he may nevertheless refuse to make the levy, if he is satisfied that the property is not liable; but proof of these facts makes out a *prima facie* case of liability against him, and imposes on him the *onus* of proving that the property was in fact not subject to levy. *Ib.* 156.

4. *Commissions of sheriff, on settlement without sale.*—When an attachment case is settled without a sale of the property levied on, the half commissions to which the sheriff is entitled (Code, § 37·7) are to be estimated, not on the amount claimed in the affidavit and complaint, but on the amount paid and accepted on the settlement. *U. S. Rolling Stock Co. v. Clark & Co.*, 322.
5. *Summary judgment against sheriff; in what court made.*—A motion for a summary judgment against a sheriff and his sureties, for his failure to make the money on an execution issued by a justice of the peace, must be made in the Circuit Court, when the amount of the judgment, with interest and costs, exceeds \$100; and if less than that sum, in the justice's court.—Code, §§ 3325, 3333. *Hood v. Blair*, 629.
6. *Same; joinder of causes of action; amendment.*—In a motion for a summary judgment against a sheriff and his sureties, for his failure to make the money on two executions issued by a justice of the peace, one of which was for less than \$100, there is an improper joinder of two separate and distinct causes of action, one of which is not within the jurisdiction of the court; but the motion may be amended, and the refusal to allow an amendment is a reversible error; and a recital in the judgment-entry, that the objections raised by demurrer "can not be cured by amendment," shows that the opportunity to amend was denied, although there is no bill of exceptions. *Ib.* 629.

SPECIFIC PERFORMANCE. See CHANCERY, 17.

SUMMARY JUDGMENTS.

1. *Against sheriff; in what court made.*—A motion for a summary judgment against a sheriff and his sureties, for his failure to make the money on an execution issued by a justice of the peace, must be made in the Circuit Court, when the amount of the judgment, with interest and costs, exceeds \$100; and if less than that sum, in the justice's court.—Code, §§ 3325, 3333. *Hood v. Blair*, 629.
2. *Same; joinder of causes of action; amendment.*—In a motion for a summary judgment against a sheriff and his sureties, for his failure to make the money on two executions issued by a justice of the peace, one of which was for less than \$100, there is an improper joinder of two separate and distinct causes of action, one of which is not within the jurisdiction of the court; but the motion may be amended, and the refusal to allow an amendment is a reversible error; and a recital in the judgment-entry, that the objections raised by demurrer "can not be cured by amendment," shows that the opportunity to amend was denied, although there is no bill of exceptions. *Ib.* 629.

SURETIES.

1. *Bond construed as contract of suretyship, not as guaranty.*—A bond signed jointly by several persons, one of whom had been appointed an agent and collector of a private corporation, by written contract made a part of the bond, reciting that for value received, and in consideration of said contract, they "hereby

SURETIES—CONTINUED.

guarantee to" said corporation "the full and faithful performance of said contract, including all damages which may result to said company from any failure on the part of said S. [collector] to perform any of the provisions of said contract, to the amount of \$1,000; hereby waiving any necessity on the part of said company of instituting legal proceedings against said S. before having recourse on us,"—binds the other obligors as sureties for S., and not as guarantors. *Saint v. Wheeler & Wilson Man. Co.*, 362.

2. *When contract of suretyship becomes binding, and how revoked.* Such contract of suretyship, unlike a guaranty, does not require notice of acceptance, but becomes complete and binding on delivery; and having been delivered, one of the obligors can not afterwards revoke it as to himself, unless the right of revocation is expressly reserved in the writing. *Ib.* 362.
3. *Release of one of several co-obligors*—The release of one of several co-obligors operates to release the others only to the extent of his aliquot share of the whole liability. *Ib.* 362.
4. *Discharge of surety by change of contract without his consent*—When a surety binds himself for the faithful discharge by his principal of duties as collecting agent for a private corporation, the subsequent imposition of additional duties on the principal, which, though not within the ordinary duties of such agents, does not in any manner prevent or hinder the performance of his former duties, for a default in the performance of which only the surety is sought to be charged, does not discharge the surety, though done without his consent or knowledge. *Ib.* 362.
5. *Same.*—A change in the contract between the principal and his employer, as to the amount of his compensation, does not discharge the surety, though made without his consent or knowledge, when it appears that the settlement between the parties, on which the default of the principal was ascertained, was based on the original contract; nor is the surety discharged because his principal, by subsequent agreement with the employer, without his knowledge or consent, was allowed to retain his compensation out of his weekly collections, instead of remitting his collections weekly to his employer, as required by the original contract of employment. *Ib.* 362.
6. *Discharge of surety, by indulgence to principal.*—Mere indulgence granted by the employer (or creditor) to the principal, or an agreement to give him further time to make good a default, if not supported by any new consideration which would make it binding as a contract, does not discharge the surety. *Ib.* 362.
7. *Concealment of principal's dishonesty, or continuance in service after discovery, as discharge of surety.*—If the employer, discovering the dishonesty of the principal during the service, fails to give notice thereof to the surety, and continues the principal in the service, the surety is discharged from liability for subsequent defaults. *Ib.* 362.
8. *Same; where employer is corporation.*—This principle applies to a private corporation, when it is shown that one of its agents, in the discharge of his duties, discovered the defalcation of the principal, failed to give notice thereof to the surety, though he had authority to do so, and continued the principal in the service; and the surety is discharged from liability for subsequent defaults. *Ib.* 362.
9. *Discharge of surety by extension of time to principal.*—An extension of the day of payment, granted by the creditor to the principal,

SURETIES—CONTINUED.

and founded on a valuable consideration, discharges the surety, if made without his knowledge and consent; and the payment of interest in advance for the extended period, in consideration of the extension, is a valid consideration, though a partial payment after maturity is not. *Scott v. Scruggs*, 383.

TAXATION.

1. *Evidence as to value of lands assessed for taxation.*—In fixing the taxable value of land, the owner's return to the assessor being controverted, it may be proper, perhaps, to receive evidence of the value of other lands in the neighborhood similarly situated, as being a feature of its surroundings; but the valuation of those lands as found upon the tax-books, whether made by the owner, the tax-assessor, or the Commissioners Court, is not admissible as evidence for any purpose. *Ala. Mineral Land Co. v. County Comm'rs*, 105.

TENANTS IN COMMON.

1. *Adverse possession between.*—The possession of land by one tenant in common is not adverse to his co-tenant, unless an actual ouster is shown, or facts which the law deems equivalent to an ouster. *Sibley v. Alba*, 191.

TENDER.

1. *Plea of tender; acceptance of money paid into court.*—When a tender before suit brought is pleaded (Code, § 2885), and the plaintiff neither demurs to the plea, nor takes issue on it, but accepts the money paid into court, the defendant is entitled to have the suit dismissed. *Hanson v. Todd*, 323.
2. *Tender of mortgage debt after default, but before possession taken, and payment of money into court.*—A tender of full payment of the mortgage debt after default, but before the mortgagee has taken or demanded possession of the property for the purpose of foreclosure, if kept good, and the money brought into court, discharges the lien of the mortgage, and extinguishes the title of the mortgagee; and on proof of these facts, the mortgagor may recover the property from a purchaser at a subsequent sale under the mortgage. *Maxwell v. Moore*, 166.

TRESPASS.

1. *Description of goods in complaint.*—In trespass for wrongfully seizing a stock of goods, it is sufficient to describe them in the complaint as "a stock of general merchandize formerly owned by L. & Brother, consisting of dry goods, groceries, hardware, &c., in the town of R., and in the M. building." *Joseph v. Henderson*, 213.
2. *When cause or trespass lies for wrongful levy on goods.*—A claimant of goods which are in the rightful possession of the sheriff under the levy of an attachment, not having either the actual possession or the immediate right of possession, can not maintain an action of trespass against a subsequent attaching creditor; but, if the subsequent attachment is wrongfully levied on the goods, and loss or injury results to the owner, he may maintain an action on the case for damages. *Ib.* 213.
3. *Whether count is in case or trespass.*—A count which claims damages for that the defendant "wrongfully caused an attachment," which he had sued out against a third person, "to be levied on a certain stock of goods which was the property of the plaintiff, but which was at that time in the possession of the sheriff under the levy of prior attachments sued out by other persons,"

TRESPASS—CONTINUED.

and avers that, "by reason of such wrongful levy, said goods were wholly lost to plaintiff by the sale thereof by the sheriff under defendant's said attachment," is in case, and shows a good cause of action. *Ib.* 213.

4. *Removal of partition fence.*—If the plaintiff's land was rented out at the time the fence was removed by the defendant, he can not maintain either trover or trespass, which lies only in favor of one who has either the actual possession or the immediate right of possession; but, if only the cleared land was rented out, while the fence which was removed extended through the wood-land beyond, he has a right of action for the latter part. *Garrett v. Sewell*, 456.
5. As to injunction of continued trespass, see CHANCERY, 5, 6.

TRIAL OF RIGHT OF PROPERTY.

1. *Burden of proof; possession as evidence of ownership.*—On the trial of a statutory claim suit, the *onus* is on the plaintiff in execution, in the first instance, to prove the defendant's ownership of the property at the time of the levy; but this burden being discharged by proof of his possession at that time, which is presumptive evidence of ownership, the *onus* then devolves on the claimant to establish his ownership at that time. *Vaught v. Oehmig & Wiehl*, 306.
2. *Assessing separate value of property; amendment of judgment.*—On the trial of a statutory claim suit, whether the issue is submitted to a jury or to the court (Code, § 3007), the judgment must show that the alternate value of the several articles of property was assessed; but the failure to do so, when the issue was submitted to the court for decision, and the record clearly shows the alternate value of the property, is an irregularity which this court will correct, and will affirm the judgment as corrected. *Ib.* 306.

TROVER.

1. *When administrator may maintain action.*—The intestate having died in August, leaving a crop of cotton in the field ungathered and still growing, which was afterwards gathered and sold by one of his sons, the bales being marked in the name of the intestate; an administrator subsequently appointed may maintain trover against the purchaser, who, when he bought the cotton, knew that the intestate was dead, and that no administration had been granted on the estate. *Marx v. Nelms*, 304.
2. *When action lies for removal of partition fence.*—If the plaintiff's land was rented out at the time the fence was removed by the defendant, he can not maintain either trover or trespass, which lies only in favor of one who has either the actual possession or the immediate right of possession; but, if only the cleared land was rented out, while the fence which was removed extended through the wood-land beyond, he has a right of action for the latter part. *Garrett v. Sewell*, 456.

TRUSTS, AND TRUSTEES.

1. *Testamentary trusts; equitable jurisdiction over trustee.*—A court of equity has undoubted jurisdiction, at the instance of the widow and children of a testator, to compel the executor, as testamentary trustee, to make a suitable provision for them out of the income of the estate, according to the terms and spirit of the will, notwithstanding the general discretionary powers given to the trustee in the management of the estate. *Ward v. Ward*, 331.

TRUSTS, AND TRUSTEES—CONTINUED.

2. *Same; allowance to beneficiaries for support and maintenance; pleading and practice.*—Under a bill filed by the widow and minor children of the testator, beneficiaries under his will, seeking to remove the administration of the estate into equity, and asking relief against the executor as testamentary trustee; a petition being filed praying an allowance out of the estate for the support and maintenance of the complainants and the education of the children, and a reference to the register being ordered to ascertain what would be a reasonable allowance; if the widow then withdraws from the cause as a party, electing to dissent from the will, the complainants can not then complain, nor can the widow or children separately complain, that the chancellor refused to act on the register's report as to what would be a reasonable allowance for their joint support as prayed in the petition. *1b. 331.*
3. *Trust for person of weak mind, voluntarily assumed.*—The relation of voluntary trustee and *cestui que trust*, as between the maker of a note under seal and his sister, a woman of weak understanding, is not established by proof of the facts, that on the sale and distribution of their father's estate, many years before, one of the executors, another brother, retained his sister's share of the proceeds in his own hands for her, she being then a minor and having no legal guardian, and, on a subsequent sale of his property to the maker of the note, preparatory to his removal from the State, the latter assumed the debt as part of the price to be paid, and executed the note payable to the sister for it. *Cameron v. Cameron, 344.*
4. *Parties to suit for distribution and settlement of trust fund; decrees in favor of persons not parties of record.*—Any number of the beneficiaries of a trust fund may maintain a suit to bring the trustee to a settlement, without joining the others; and any judgment creditor may file a bill to set aside a fraudulent conveyance executed by his debtor, without joining other creditors as complainant with him; and the court may, in either case, render decrees in favor of persons who are not named as complainants in the bill. *Thornton v. Tison, 589.*
5. *Transactions between parties occupying fiduciary relations towards each other.*—The general principle which a court of equity applies to transactions between persons occupying fiduciary relations towards each other, is not confined to cases in which there is any formal or technical fiduciary relation, such as guardian and ward, parent and child, client and attorney, &c., but extends to all cases in which confidence is reposed by one party in the other, and the trust is accepted, under circumstances which show that the confidence was founded on the intimate personal and business relations existing between the parties, which gave the other party an advantage or superiority; and in such cases, the *onus* is on the party in whom the confidence is reposed to show that no fraud, undue influence, or other improper motive entered into the transaction, but that it was the voluntary act of the other party, fully understood by him, and his understanding of it fully expressed in the writings which he signed. *Kyle v. Perdue, 579.*
6. *Same; case at bar; conveyance cancelled.*—In this case, the instrument assailed by the grantor, an old woman in feeble health, by which she conveyed all her property to the grantees, wealthy men engaged in active business pursuits, in trust that they should take charge of the property, collect the rents, make

TRUSTS, AND TRUSTEES—CONTINUED.

necessary repairs, pay taxes out of the rents collected, and pay the residue to the grantor during her life, was set aside and cancelled at her instance, on evidence showing that, although they had not solicited her to make any conveyance of her property to them, they were her intimate friends, whom she consulted in all business affairs, and who represented to her, at the time when she signed the conveyance, that it bound them to support and maintain her during life, while in fact it only bound them to apply the surplus income of her own property, after payment of repairs and taxes, to her support. *Ib.* 579.

7. As to sales by a trustee under a power in a deed of trust, see MORTGAGES, 14-20.

VENDOR AND PURCHASER.

1. *Recital in note that it was given for purchase-money of land.*—When a promissory note was in fact given for money borrowed to make a cash payment on a purchase of land, a vendor's lien is not created by a recital therein that it was given for the purchase-money of the land. *Steiner Bros. v. Clisby*, 91.
2. *Sale of personal property; want of title, as defense to action for purchase-money.*—In an action to recover the price of personal property sold and delivered, the purchaser remaining in undisturbed possession, and no fraud being alleged, a want of title in the vendor is no defense, though accompanied with an offer to rescind and its refusal. *Johnson v. Orhmig & Wiehl*, 189.
3. *Sale of perishable goods for future delivery; inspection by purchaser.* On a sale of a car-load of oranges, to be shipped from California to the purchaser at Birmingham, Alabama, "subject to inspection, and to be received if found by him to be sound and bright, and if otherwise to be rejected;" the seller is not required to provide in the bill of lading that the purchaser has the right of inspection on the arrival of the car, nor can the purchaser refuse to receive the oranges because the railroad agent refused to let him inspect them without further orders, provided he was allowed to inspect them within a reasonable time after their delivery, to be determined by the jury on a consideration of all the facts and circumstances of the case. *Hudson v. Germain Fruit Co.*, 821.
4. *Rescission of contract, at instance of purchaser, on ground of fraud.* A court of equity will not decree the rescission or cancellation of a contract for the sale of land, at the instance of the purchaser, on account of fraudulent misrepresentations made by the vendor, upon a bare probability, or mere preponderance of the evidence, but requires the complainant to establish his case by clear and convincing evidence. *Houle v. N. B. Land Co.*, 389.
5. *Same; laches.*—The purchaser of land, claiming a rescission of the contract on the ground of fraud, must act with promptness on its discovery; and when he delays for three years, as in this case, and then sets up the fraud in defense of a bill to enforce a vendor's lien, relief will be refused on account of the laches. *Ib.* 389.

WILLS.

1. *Bequest for benefit of testator's father, mother and sister, as members of his family.*—Where the testator had contributed liberally during his life to the support of his father, mother and sister, as members of his family, and by his will declared, "I desire, if agreeable to the parties concerned, that my mother, father and

WILLS—CONTINUED.

- sister shall continue to reside with my family, and that my trustee shall contribute towards their support out of my estate as I do at this time;" *held*, that this provision was not intended to make the contribution for the support of the father, mother and sister dependent upon their continued residence in the same house with the widow, nor upon the fact that it was agreeable to her; and that the trustee was authorized to continue a reasonable allowance to them, according to the income of the estate, although they and the widow had removed from the testator's residence, and occupied different dwellings. *Ward v. Ward*, 331.
2. *Contest of will in equity*.—Under statutory provisions regulating the probate and contest of wills (Code, §§ 1987-89, 2000), a person interested in the estate who did not contest the will when offered for probate, although he employed counsel, and was examined as a witness for the contestant, may contest it by bill in chancery at any time within five years. *Knox v. Paull*, 505.
 3. *Testamentary papers probated together; revocation by later will*.—A testamentary paper executed by the testatrix five or six years before her death, in execution of a testamentary power conferred on her by her deceased husband, is not revoked, as matter of law, by the execution and destruction of a later will, which is not shown to have revoked it; nor by the execution of a third will, a few months before the death of the testatrix, containing substantially the same provisions, but not referring to it; and the two instruments may be admitted to probate together, as constituting the entire last will and testament of the testatrix. *Knox v. Knox*, 495.
 4. *What is testamentary capacity*.—If the testatrix had mind and memory sufficient to recall and remember the property she was about to bequeath, the objects of her bounty, and the disposition which she wished to make—to know and understand the nature and consequences of the business to be performed, and to discern the simple and obvious relation of its elements to each other—then, in legal contemplation, she had a sound mind and disposing memory. *Ib.* 495.
 5. *What is undue influence*.—The undue influence which will avoid a will, must amount to coercion or fraud, destroying the free agency of the testator, and constraining him to do what is against his will; mere persuasion or argument addressed to the judgment or the affections, in which there is no fraud or deceit, does not constitute undue influence. *Ib.* 495.
 6. *Relevancy of evidence as to mental condition of testatrix*.—When the probate of a will is contested on the ground of mental incapacity or undue influence, the real issue is as to condition of the mind, or the operation and effect of the undue influence, at the time the will was executed; but former facts and circumstances, relevant to this issue, are admissible as evidence for either party. *Ib.* 495.
 7. *Will making unequal disposition of property*.—The law does not undertake to prescribe or regulate the duties of a testator in the disposition of his property, and the fact that he makes an unequal disposition of it among his next of kin does not impose upon the proponents, or beneficiaries under the will, the onus of "giving some reasonable explanation of the unnatural character of the will, or at least showing that it is not the offspring of mental defect, obliquity, or perversion." *Ib.* 495.
 8. *Declaration of devisee and proponent as evidence*.—The declarations

WILLS—CONTINUED.

of an executor and proponent, one of several beneficiaries under the will propounded for probate, not made in the presence of the testatrix, are not competent evidence for the contestant, whether made before or after the execution of the will. *Eastie v. Montgomery*, 486.

9. *Undue influence; relevancy of evidence as tending to show.*—As tending to prove undue influence over the testatrix by one of her sons, one of the executors and proponents, who was his mother's general agent in the transaction of her business, the contestant can not be allowed to prove that, on a sale of land by her, the son signed her name to the bond for title. *Ib.* 486.
10. *Evidence as to pecuniary condition of children not provided for by will.*—It being shown on the part of the contestant that affectionate relations existed between the testatrix and certain grandchildren, for whom the will made no provision, the proponents may prove that these children had considerable property of their own. *Ib.* 486.
11. *Burden of proof in case of confidential relations; participation of proponent in preparation of will.*—Where it is shown that the chief executor and proponent of the will was the general agent of the testatrix, his mother, in the transaction of her business, the fact that he carried her to town with him, on her own request, and procured an attorney named by her to write her will, does not show such active participation on his part in the procurement of the will as, coupled with the existence of the confidential relations between them, will cast on him the *onus* of disproving undue influence. *Ib.* 486.
12. *Charge as to influence of fear or imaginary terrors in procuring will.* A charge asked, in these words, "The conduct of one in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror or dread, and to make him execute as his will an instrument which, if he had been free from such influence, he would not have executed; imaginary terrors may have been created sufficient to deprive him of his free agency,"—is properly refused. *Ib.* 486.
13. *Charges as to testamentary incapacity, and burden of proof.*—Charges given at the instance of the proponents, instructing the jury, in effect, that testamentary incapacity must exist at the time of the execution of the will. that the burden of proof as to such incapacity is on the contestants, the presumption being in favor of sanity and capacity, and this burden can only be discharged or shifted by proof of prior habitual or fixed insanity, or actual insanity or other incapacity at the date of the instrument,—are correct expositions of the law. *Ib.* 486.
14. *Charge as to testamentary capacity.*—A charge instructing the jury that, "if the testatrix had mind and memory enough to recollect the property she was about to bequeath, and the person to whom she wished it to be disposed of, and to know and understand the business she was engaged in, then, in contemplation of law, she had a sound and disposing mind, and her great age and bodily infirmities do not vitiate a will thus made,"—asserts a correct legal proposition. *Ib.* 486.
15. *Charge as to undue influence; explanatory charge.*—A charge which instructs the jury that they must find in favor of the contestants, "unless the evidence shows that the will was obtained by moral coercion, or by importunity which could not be resisted by the testatrix," asserts a correct legal proposition: and if the contestant fears it may mislead the jury, because the will was

WILLS—CONTINUED.

- contested on other grounds, he should ask an explanatory charge. *Ib.* 486.
16. *Verbal promise to make will, as consideration of deed.*—A verbal promise to make a will devising land to the promisee, in consideration of his present conveyance of the land to the promisor, is void under the statute of frauds (Code, §§ 1732, 1845), and a court of equity will not grant relief based on it. *Manning v. Pippen*, 537.
 17. *Fraudulent promise to make will.*—If a person procures the execution of a conveyance of land by promising to devise the land by will to grantor, having at the time the intention not to do so, and afterwards dies intestate, the fraud will vitiate the transaction, and a court of equity will grant relief against the conveyance; but the fraud must be established by clear and convincing evidence, and relief must be sought seasonably after the discovery of the fraud; and the subsequent breach of the promise, by failing and refusing to execute such will, is not, of itself, conclusive or sufficient evidence that the promise was made with a fraudulent intent. *Ib.* 537.
 18. *Same; allegations as to discovery of fraud.*—The bill being filed by the husband, against the heirs at law of his deceased wife, seeking relief against a conveyance of land, which he had executed to her, as alleged, in consideration of her fraudulent promise to devise it to him by will, and alleging that "the fact that it was her intention at the time not to comply with her said promise, and that she was employing a mere stratagem, and the evidence of such intention, did not become known to your orator until he filed his original bill in this cause, though he made repeated and diligent inquiry in reference thereto;" these averments do not meet the strict requirements of the rule applicable in such cases, because they do not show how the fraud was discovered, nor why it was not discovered sooner. *Ib.* 537.
 19. *Same; laches.*—The lapse of sixteen years after the alleged promise was made, during which period the wife repeatedly refused to execute her will as promised, bars any right to relief against her heirs after her death, even if the averments of the bill were fully and precisely proved. *Ib.* 537.

WITNESS.

1. *Leading questions to a witness*, such as suggest to him the answer desired or expected, are properly ruled out, if objected to. *Railroad Co. v. Crocker*, 412.
2. *Impeaching witness.*—A witness can not be impeached by evidence contradicting his testimony as to an immaterial inquiry. *DeLouch Mills Co. v. Middlebrooks*, 459.
3. *To what witness may testify.*—The chief engineer of a railroad company, testifying as to work done by plaintiff on railroad trestles, whether as original railroad contractor or as sub-contractor under one P. being the question at issue, may use these expressions: "This contract was given to him by P. at my special instance, and because of my previous negotiations with him; the amount of work done by him for P. on the trestles is the identical amount of work he would have done for the company if the company had contracted directly with him instead of P., as he did all the framing that was done on the trestles." Also, "At all events, the entire claim is erroneous, . . . and, from an engineering stand-point, is preposterous." *M. & B. Railroad Co. v. Worthington*, 598.

WITNESS—CONTINUED.

4. *Evidence as to speed of moving car; what witness may state.*—Where the injuries complained of are alleged to have been caused by the negligence of the foreman of a car on which plaintiff was working, by suddenly checking it while moving at a rapid rate of speed, whereby plaintiff was thrown off, run over and injured; the rate of speed of the car being relevant and material to the issue, and plaintiff having testified that it was moving at the rate of eight or ten miles an hour, he may be asked, "About how fast, compared to a man running?" and may answer, "It was running faster than a man could run." *K. M. & B. Railroad Co. v. Crocker*, 412.
5. *To what witness may testify, as to performance and discharge without fault.*—Plaintiff, testifying for himself, in an action to recover damages for a breach of contract of employment, can not be allowed to state that defendant "discharged him without fault on his part," nor that he "performed his part of the contract in full up to the time of his discharge;" and the questions calling for such statements are illegal because leading. *Clark v. Ryan*, 406.

Ex 16. N. C.

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